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FILED
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

NEW YORK LIFE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITON FOR A WRIT OF CERTIORARI

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92 pp

QUESTIONS PRESENTED

1. Whether the payment under protest of a tax liability that has not been assessed constitutes a "deposit," rather than a "payment" of tax, as a matter of law.

2. Whether, in the absence of any express or implied "deposit" agreement, a claim for the recovery of funds remitted to the United States in connection with an asserted tax liability is within the jurisdiction of the United States Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491.

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PETITON FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 118 F.3d 1553. The opinion of the United States Court of Federal Claims (App., *infra*, 27a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was filed on July 3, 1997. The petition for rehearing with suggestion for rehearing *en banc* was denied on September 26, 1997 (App., *infra*, 25a-26a). On December 16, 1997, the Chief Justice extended the time for filing a

petition for a writ of certiorari to and including January 26, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. 28 U.S.C. 1491(a)(1) provides, in relevant part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

2. 28 U.S.C. 1346(a)(1) provides:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws; * * * .

3. 26 U.S.C. 7422(a) provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any

sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

4. Rev. Proc. 84-58, 1984-2 C.B. 501, is reproduced at App., *infra*, 40a-50a.

STATEMENT

1. As a mutual life insurance company, respondent is allowed a deduction under Section 808(c)(1) of the Internal Revenue Code for the amount of "policyholder dividends" that it pays. 26 U.S.C. 808(c)(1). In calculating that deduction on its 1987 income tax return, respondent employed a methodology that had been rejected by the Commissioner of Internal Revenue.[1] The Commissioner therefore determined that a corrective adjustment was required on respondent's return. That adjustment eliminated a net operating loss carryback that respondent had claimed and increased respondent's tax liability for 1984 by $19,386,791 (App., *infra*, 2a).

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[1] The deduction for policyholder dividends is reduced by what is known as the "differential earnings amount." 26 U.S.C. 808(c)(2), 809(a)(1). The calculation of the "differential earnings amount" requires determination of the "differential earnings rate." 26 U.S.C. 809(a)(3)(B). Respondent took the position that a negative "differential earnings rate" could be employed in making this calculation. The Commissioner has concluded, however, that only a positive "differential earnings rate" may be applied under the statute. The Commissioner's interpretation of the statute has been consistently upheld. See *Indianapolis Life Ins. Co.* v. *United States*, 115 F.3d 430 (7th Cir. 1997); *American Mutual Life Ins. Co.* v. *United States*, 43 F.3d 1172 (8th Cir. 1994), cert. denied, 116 S. Ct. 335 (1995).

Respondent and the Commissioner reached a tentative settlement of this tax liability. Under the settlement, respondent agreed to pay the entire amount of the adjusted tax liability and reserved "the right to prosecute a refund claim" (App., *infra*, 33a-34a). To implement this settlement agreement, respondent sent a check for $31,912,823 to the Internal Revenue Service on December 17, 1993, with a cover letter "explaining that the remittance was 'payment' for income tax and accrued interest for 1984" (*id.* at 28a). The letter further specified that the remittance was a "partial payment[] pursuant to Section 4.03 of Rev. Proc. 84-58" (*id.* at 29a).[2] That Revenue Procedure provides (i) that a remittance designated by the taxpayer as a partial payment of tax "will be posted to the taxpayer's account as a payment as of the date it is received" and (ii) that a remittance will be treated "as a deposit in the nature of a cash bond" only "[i]f the Service is unable to determine whether a partial remittance is intended to be a payment of a tax or a deposit" (1984-2 C.B. 503).[3]

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[2] The letter that respondent sent with its remittance stated (C.A. App. 76):

> This payment is to be considered a partial payment, pursuant to Section 4.03 of Rev. Proc. 84-58, of the additional tax which the District Director determined to be due for 1984 * * * . The portion of the proposed additional tax asserted by the District Director which the taxpayer intends to satisfy by this payment is based on a tentative settlement with the Appellate Division.

[3] Pursuant to the instructions in Revenue Procedure 84-58, respondent directed the $31,912,823 remittance to be recorded as (i) a payment of additional income tax in the amount of $19,374,668 and (ii) a payment of accrued interest on that tax in the amount of $12,538,155 (App., *infra*, 3a). Unlike a "pay-

The statute of limitations for assessment of the tax liability thus paid by respondent expired on September 30, 1994.[4] Having received full payment pursuant to the settlement agreement, the Service made no assessment of those taxes (App., *infra*, 29a).

2. Although respondent expressly reserved the "right to prosecute a refund claim" under the settlement agreement, respondent elected not to do so (App., *infra*, 3a). If respondent *had* brought a refund suit to recover its tax "payment," respondent would have been required to establish that the tax was in fact not owed at the time that it was paid. *Lewis* v. *Reynolds*, 284 U.S. 281, 283 (1932); see pages 11-12, *infra*. Because respondent's position on the merits of the tax issue was quite weak (see note 1, *supra*), there was little liklihood that respondent would be able to prevail in a tax "refund" suit.

Accordingly, instead of prosecuting a refund suit, respondent waited until the time for assessment of the tax expired and brought this different suit in the United States Court of Federal Claims. In this suit, respondent does *not* contend that the tax was not owed at the time that it was paid and that a "refund"

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ment," a "deposit" cannot be designated by the taxpayer for apportionment between principal and interest. Rev. Proc. 84-58, 1984-2 C.B. at 504.

[4] During the audit, the parties had agreed to extend to September 30, 1994, the statute of limitations for making an assessment against respondent for the 1987 tax year (App., *infra*, 2a-3a). Because the additional liability for 1984 involved in this case resulted from the disallowance of the net operating loss carryback claimed from 1987, the extension of the statute of limitations for the 1987 year also extended the period in which the deficiency for the 1984 year could be assessed. See 26 U.S.C. 6501(h).

of the "payment" that it made under the settlement agreement is therefore required. Instead, respondent claims (i) that its $31 million remittance to the government was only a "deposit" and not a "payment" of the tax and (ii) that the deposited funds must be returned (even if the tax was owed at the time it was paid) because it is now too late for the tax to be assessed (App., *infra*, 4a). Respondent has thus elected to proceed exclusively on the theory that the remittance that it expressly made as a "payment" of taxes should instead be treated as if it were a "deposit," and returned to it (*ibid.*).[5]

3. The Court of Federal Claims entered judgment for respondent (App., *infra*, 39a). The court first concluded that the Tucker Act, 28 U.S.C. 1491, provides jurisdiction to award a money judgment against the United States on a claim for recovery of a "deposit" of taxes. The court stated that the jurisdictional limitations and restrictions on recovery that apply to tax refund suits are irrelevant to this case because respondent "seeks the recovery of a remitted deposit rather than a refund of taxes paid" (App., *infra*, 37a).[6]

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[5] After this suit was commenced, respondent filed a protective administrative refund claim on January 23, 1995 (App., *infra*, 8a) (Rader, J., dissenting). Pending the disposition of the present litigation, that "refund" claim has not been pursued by respondent.

[6] In particular, the court stated that the statutory requirement that an administrative refund claim be filed before a refund suit is brought (26 U.S.C. 7422(a)) is inapplicable to any suit for recovery of a "deposit" (App., *infra*, 37a). The court also did not limit the recovery to the amount of the payment in excess of what was owed at the time of the payment, as it would have been required to do in a refund suit (*Lewis* v. *Reynolds*, 284 U.S. at 283).

The court also ruled in respondent's favor on the merits. The court noted that, at the time the $31 million remittance was made, respondent expressly identified the funds as a "payment" of its contested tax liability (App., *infra*, 32a). Indeed, respondent referred "to the money as a 'payment' seven times" (*ibid.*). "Despite the facts that suggested the remittance was a payment," the court concluded that the remittance should nonetheless be treated as a "deposit" because the taxpayer disputed the amount of its liability and the tax had not been assessed by the Service (*id.* at 33a). The court stated that, under *Cohen* v. *United States*, 995 F.2d 205 (Fed. Cir. 1993), these two facts establish that the remittance was a "deposit" as a matter of law (App., *infra*, 31a). Because the tax had not been assessed by the Commissioner before the time for assessment expired, the court held that respondent was entitled to demand the return of the entire "deposit." The court therefore entered judgment for respondent for $31,912,823 (*id.* at 37a).

4. The Federal Circuit affirmed (App., *infra*, 1a-16a), with one judge dissenting (*id.* at 17a-24a).

a. On the jurisdictional issue, the court of appeals acknowledged (App., *infra*, 5a) that the Tucker Act "does not create any substantive right against the United States" and that "the claimant must demonstrate that the source of substantive law he 'relies upon can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States* v. *Mitchell*, 463 U.S. 206, 217-218 (1983), quoting *United States* v. *Testan*, 424 U.S. 392, 400 (1976). The court further acknowledged that respondent's claim does not arise under any express provision of the Internal Revenue Code: (i)

the tax refund provisions of the Code (26 U.S.C. 7422) do not apply to this case because this is "not a suit for the return of a tax payment" (App., *infra*, 13a); and (ii) there is nothing in the Code that "deal[s] with deposits of taxes or provide[s] procedures for their making or recovery" (*id.* at 7a). The court nonetheless stated that this suit is within the jurisdiction provided by the Tucker Act because respondent seeks to recover money "improperly paid [or] exacted . . . in contravention of . . . a statute [namely, 26 U.S.C. 809]" (App., *infra*, 7a (brackets and omissions original), quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1007 (Cl. Ct. 1967)). The court reasoned that, even though the provisions of the Internal Revenue Code that expressly limit the availability and scope of taxpayer refund suits are unquestionably not satisfied in this case, Congress necessarily intended to allow a *non*-statutory suit for money damages in the Court of Federal Claims for money "improperly paid [or] exacted * * * in contravention" of any provision of the Internal Revenue Code that provides a deduction in the calculation of such taxes (App., *infra*, 7a).

b. Although the court thus premised its jurisdiction on the theory that this case involves a claim for recovery of money "improperly paid [or] exacted * * * in contravention of * * * 26 U.S.C. 809" (App., *infra*, 7a), the court then proceeded to decide the merits of the case without any further reference to that statute. In particular, the court never inquired (and certainly never determined) *whether* the government had erroneously calculated respondent's deduction "in contravention of" the statute on which the court relied. See note 1, *supra*. Instead, citing no source of substantive law for its holding, the court concluded that the remittance must be returned to

respondent in its entirety because it was made as a "deposit," rather than as a "payment" of tax (App., *infra*, 16a). The court held that the remittance was a "deposit 'as a matter of law'" because (i) it was "made under protest" with a reservation of "the right to seek return of the money" and (ii) the Service did not "assess the deficiency" (*id.* at 15a, citing *Cohen* v. *United States*, 995 F.2d 205 (Fed. Cir. 1993)).

Having concluded that these two factors are sufficient by themselves to make the remittance "a deposit 'as a matter of law'" (App., *infra*, 15a), the court declined to give any weight to the many "facts and circumstances" that show that a "payment" rather than a "deposit" was in fact intended and in fact made by respondent. In particular, the court regarded respondent's express and repeated designation of the remittance as a "payment" as simply irrelevant to this case. The court concluded that the entire $31 million that respondent expressly remitted in 1993 as a "payment" of taxes instead constituted a "deposit 'as a matter of law'" and must be returned by the United States (*ibid.*).[7]

c. Judge Rader dissented (App., *infra*, 17a-24a). He noted that it is implausible to describe respondent's remittance as a "deposit" rather than a "payment" for, at the time the deficiency in respondent's taxes was determined, respondent stipulated to "*pay the tax* * * * and reserve the right to prosecute *a refund claim therefor*" (*id.* at 18a). He further observed that "the letter accompanying the [remittance] referred to this transaction six times as a 'payment' of taxes"

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[7] The court of appeals stated that the government "could have avoided this situation" by assessing the tax at the time that the remittance was made (App., *infra*, 16a).

(*ibid.*). Because a payment of tax was made, respondent could proceed only by satisfying the limitations and restrictions applicable to statutory refund suits (*ibid.*).

Judge Rader noted, moreover, that respondent's jurisdictional argument "fails the most elemental test for a non-contract claim under the Tucker Act: it does not invoke a money mandating statute" to justify an award of monetary relief against the United States (App., *infra*, 19a). He pointed out that the only statutory basis for recovering an amount "illegally exacted * * * in contravention of" the Internal Revenue Code is the statutory refund suit, which may be brought only after an administrative refund claim has been filed (*id.* at 21a, citing 26 U.S.C. 7422). He concluded that "[t]he Tucker Act does not permit this court to address this case without sending [respondent] back to bring a proper tax refund action" (App., *infra*, 17a).

REASONS FOR GRANTING THE PETITION

In holding that the remittance of a disputed tax that has not been assessed constitutes a "deposit," rather than a "payment," as a matter of law, the Federal Circuit erred in its application of this Court's decision in *Rosenman* v. *United States*, 323 U.S. 658 (1945), and created a direct conflict with the decisions of three other circuits. See *Zeier* v. *United States*, 80 F.3d 1366 (9th Cir. 1996); *Moran* v. *United States*, 63 F.3d 663, 667-668 (7th Cir. 1995); *Ewing* v. *United States*, 914 F.2d 499, 502-503 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991). In further holding that the Tucker Act creates jurisdiction for the recovery of a "deposit" that was "improperly exacted" by the government, the Federal Circuit improperly disregarded the

express limits on its jurisdiction and deprived the detailed statutory provisions governing tax refund suits of their plain meaning.

The decision of the court of appeals is of exceptional recurring importance, for it creates confusion and uncertainty for the most basic aspects of administration of the internal revenue laws. In the absence of a decision by this Court resolving the conflict among the courts of appeals, the treatment afforded to similarly situated taxpayers will vary based solely upon geographic happenstance. Review by this Court is warranted to avoid continuing uncertainty and disparate application of the revenue laws.

1. The Tucker Act provides only a limited jurisdiction to the Court of Federal Claims. That court has jurisdiction over a "claim against the United States" that is "founded * * * upon" the Constitution, a statute, a regulation or an "express or implied contract with the United States" or that is "for liquidated or unliquidated damages in cases not sounding in tort" (28 U.S.C. 1491(a)(1)). Because the extent of this limited jurisdiction expressly turns on the nature of the "claim against the United States" (*ibid.*), it is necessary first to determine the nature of respondent's claim for the recovery of a "deposit" of taxes before addressing the jurisdictional question presented in this case.

a. Congress has established a detailed statutory scheme for tax refund claims. See *Flora* v. *United States*, 362 U.S. 145 (1960). A taxpayer has only a limited period of time to seek a refund after paying a tax (26 U.S.C. 6511) and must file an administrative refund claim as a prerequisite for commencing any judicial refund suit (26 U.S.C. 7422(a)). Moreover, in any such suit for a refund, the taxpayer must estab-

lish that the tax was not owed at the time that it was paid. As this Court has explained, "[a]lthough the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded." *Lewis* v. *Reynolds*, 284 U.S. at 283.

Respondent seeks to avoid these three important limitations on tax refund suits by contending that its remittance—though clearly styled and accepted as a "payment" of tax (App., *infra*, 32a)—was only a "deposit" to which these rules do not apply. While "[c]laims for tax refunds must conform strictly to the requirements of Congress," if the taxpayer has made a "deposit" rather than a "payment" of tax, these "refund" suit requirements are inapplicable. *Rosenman* v. *United States*, 323 U.S. at 661.

In *Rosenman*, the Court drew a distinction between a remittance tendered as a "payment" of tax—which triggers the limitations applicable to tax refund suits—and a remittance tendered as a "deposit" of tax—which is not subject to those limitations. The Court concluded in *Rosenman* that a "deposit" occurs when a remittance is tendered to the government as part of an "interim arrangment" to cover "future" contingencies and is not tendered to "discharge * * * a liability" or to "pay one that was asserted." 323 U.S. at 662.[8] The Court noted in *Rosenman* that the

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[8] The Court reasoned that the taxpayer entered into a "deposit arrangement" to stop the running of penalties and interest and that the government thereby received a "cash bond for the payment of taxes thereafter found to be due." 323 U.S. at 662.

government has given a "practical construction * * * [to] such arrangments" and "does not consider" advances from the taxpayer to constitute "tax payments." *Ibid.* The Court concluded that it merely "interpret[s] a business transaction according to its tenor" to recognize that "receipt by the Government of moneys under such an arrangment" constitutes a "deposit" rather than a "payment" of tax. *Id.* at 662, 663.

The "deposit arrangement" described by the Court in *Rosenman* was not premised on any statutory authority. Indeed, there is no provision for—or even any mention of—"deposits" under the Internal Revenue Code. The "deposit arrangement" described in *Rosenman* was instead derived from the Court's perception of the "practical construction" of "the business transaction" of the parties. 323 U.S. at 663. The evident rationale of *Rosenman* is that the taxpayer and the government have expressly or impliedly agreed to an "arrangement" under which the remittance is tendered by the taxpayer, and accepted and treated by the government, as a "deposit * * * in the nature of a cash bond." *Id.* at 662.[9]

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[9] In *Rosenman*, the taxpayer brought a suit for refund under (what is now) 26 U.S.C. 7422. The Court held that the refund suit was not untimely because only a deposit and not a "payment" of tax had been made and the statute of limitations on the refund suit (which runs from the date of "payment") had therefore not expired. 323 U.S. at 659. Unlike respondent, the taxpayer in *Rosenman* did not attempt to recover the full remittance. Instead, the taxpayer in *Rosenman* sought to recover only the amount of the "deposit" that exceeded the taxes that were owed at the time the deposit was made. *Id.* at 660. Nothing in this Court's decision in *Rosenman* provides any support for the theory that a suit may be brought under the Tucker Act for the recovery of a "deposit" in the absence

b. In the present case, however, there plainly was no deposit "arrangement" between the taxpayer and the government of the type that the Court described in *Rosenman*. To the contrary, the evidence clearly established that a "payment" rather than a "deposit" was in fact intended by *both* parties at the time the remittance was made (App., *infra*, 32a). It is also undisputed that the specific requirements that the United States established *after Rosenman* to expressly set forth the circumstances and conditions under which the government will accept a "deposit" rather than a "payment" of taxes (Rev. Proc. 84-51, 1984-2 C.B. 501; see also Rev. Proc. 82-51, 1982-2 C.B. 839) were not met in this case.[10] There was thus plainly no express or implied-in-fact "business transaction" or "arrangement" between the parties for a "deposit" rather than a "payment" to be made. The essential prerequisites of this Court's decision in *Rosenman* are thus not satisfied in this case. Because the remittance was tendered by respondent

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of an express or implied-in-fact contractual deposit "arrangment" between the taxpayer and the government.

[10] The Internal Revenue Service has clearly specified in revenue procedures the circumstances and conditions upon which a taxpayer may make a remittance that the government will accept and treat as a "deposit." Under these procedures, a taxpayer—typically one under audit who expects to receive an adverse determination—must expressly designate the remittance as a deposit. A deposit thus made is returnable on demand, without interest, until such time as the Service is authorized to make the assessment. Rev. Proc. 82-58, §§ 4.01.3, 4.02.1, 1984-2 C.B. 501. In the present case, however, respondent manifestly did not make a deposit in accordance with these revenue procedures (App., *infra*, 32a). Respondent instead stated expressly that it wished its $31 million remittance to be treated as a "payment" and not as a deposit (*ibid.*).

and was accepted by the government as a "payment" and not as part of a deposit "arrang- ment," it may not be recovered without "conform[ing] strictly to the requirements of Congress" for tax refund claims. *Rosenman* v. *United States*, 323 U.S. at 661.

c. The court of appeals erroneously concluded, however, that *any* remittance of a tax liability made under protest is a "deposit" rather than a "payment" of tax—"as a matter of law"—if the remittance was made before the tax was assessed (App., *infra*, 15a). That holding fundamentally misapplies this Court's decision in *Rosenman*, which describes a "deposit" as a consensual "business transaction" under which the remittance is "consider[ed]" by the parties as merely an "advance" in the nature of a "surety bond." 323 U.S. at 662.

The decision of the court of appeals appears to emanate from a misunderstanding of the basic mechanics of routine tax payments. Most taxes are paid without an assessment of liability. For example, the taxes that are routinely withheld from wages and the taxes that are routinely remitted with annual or quarterly tax returns are plainly "payments" of tax even though they are made before any assessment of the liability occurs. See 26 U.S.C. 6151(a) (the taxpayer is to "pay such tax" with the return "without assessment or notice and demand from the Secretary"); note 12, *infra*. On the theory adopted by the court of appeals in this case, however, such routine payments of taxes would apparently constitute "deposits" as a matter of law. Obvious and substantial confusion in the routine administration of the tax law would result from the decision in this case, for a dispute over whether a remittance was a "payment" or a "deposit

'as a matter of law'" could be raised in almost any setting.

d. The Fifth Circuit has joined the Federal Circuit in interpreting *Rosenman* to conclude that any remittance (even one expressly styled as a "payment") that is made under protest prior to assessment constitutes a "deposit" rather than a "payment" of tax as a matter of law. See *Thomas* v. *Mercantile National Bank*, 204 F.2d 943 (5th Cir. 1953).[11] The rule adopted by these courts conflicts directly with the decisions of the Ninth Circuit in *Zeier* v. *United States*, 80 F.3d at 1360, the Seventh Circuit in *Moran* v. *United States*, 63 F.3d at 667-668, and the Fourth Circuit in *Ewing* v. *United States*, 914 F.2d at 502-503. The latter circuits have concluded that the "facts and circumstances" of each case must be considered in determining whether the parties intended the remittance to be treated as a payment or as a deposit.[12]

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[11] The Fifth Circuit has expressed serious doubt as to the correctness of that rule, but follows it as a matter of *stare decisis*. See *Ford* v. *United States*, 618 F.2d 357 (1980).

[12] Some courts have adopted variations of these two basic approaches. They have held that certain specific types of remittances—such as quarterly estimated tax payments and wage withholdings—constitute a "payment" rather than a "deposit" as a matter of law, even in the absence of any assessment of the tax. See, *e.g.*, *Gabelman* v. *Commissioner*, 86 F.3d 609 (6th Cir. 1996) (estimated taxes); *Weigand* v. *United States*, 760 F.2d 1072 (10th Cir. 1985) (same); *Ehle* v. *United States*, 720 F.2d 1096 (9th Cir. 1983) (wage withholdings). The Eighth Circuit, by contrast, has applied different rules in different cases and has provided no general rationale for distinguishing between payments and deposits. *Compare United States* v. *Dubuque Packing Co.*, 233 F.2d 453 (8th Cir. 1965) *with Essex* v. *Vinal*, 499 F.2d 226 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975).

The Federal Circuit erred in reasoning that a remittance made under protest is necessarily a "deposit" rather than a "payment" (App., *infra*, 15a). The Internal Revenue Code specifies, to the contrary, that a refund suit may be brought "whether or not such tax * * * has been paid under protest or duress" (26 U.S.C. 7422(b)). As the Seventh Circuit stated in *Moran* v. *United States*, 63 F.3d at 669, it is incorrect "that the decision to dispute a liability necessarily signifies an intent not to make a payment on that liability."

The absence of an assessment is also not an indication that a "deposit" rather than a "payment" was made. As other courts have explained in rejecting the reasoning of the Federal Circuit in this case, the liability to "pay" a tax exists independently of "assessment or notice and demand from the Secretary" (26 U.S.C. 6151(a)). An "assessment" is simply the administrative act of "recording the liability of the taxpayer in the office of the Secretary" (26 U.S.C. 6203). As the Seventh Circuit held in *Moran* v. *United States*, 63 F.3d at 666-667, an "assessment" is a prerequisite for various collection activities, but "the liability of the taxpayer" exists independently of the assessment (26 U.S.C. 6203).[13]

The theory of the Federal Circuit that "there can be no payment of tax before the IRS makes a formal assessment of the estate's tax liability" has now been squarely rejected by three courts of appeals. *Zeier* v. *United States*, 80 F.3d at 1364. See *Moran* v. *United States*, 63 F.3d at 666 ("an assessment is not a prereq-

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[13] Indeed, suit may be brought by the government to collect a tax "without assessment" if the suit is brought within the applicable period of limitations. 26 U.S.C. 6501(a).

uisite to tax liability"); *Ewing* v. *United States*, 914 F.2d at 502 (rejecting notion that "prior to assessment, there can be no tax liability and thus no 'payment' of tax"). These courts have instead concluded that, in determining whether a "payment" or a "deposit" was made, courts are to look to the "facts and circumstances" surrounding the actual conduct of the parties. See, *e.g.*, *Moran* v. *United States*, 63 F.3d at 667-668 (citing cases); *Ewing* v. *United States*, 914 F.2d at 503 (the facts and circumstances test "is the better reasoned [analysis] and represents the clear weight of authority").

Under the "facts and circumstances" test, the remittance made in this case would unquestionably constitute a "payment" rather than a "deposit." The funds were expressly tendered as a "payment" of tax and were accepted on that basis by the government (App., *infra*, 32a). This Court's decision in *Rosenman* also requires this same conclusion: there was no express or implied agreement or "arrangement" between the parties to treat this remittance as anything other than a "payment" of taxes (App., *infra*, 32a). Indeed, now that the Service has adopted a formal Revenue Procedure that specifies the conditions under which deposits may be tendered by taxpayers and accepted by the government (Rev. Proc. 84-58, *supra*; see note 10, *supra*), the failure of a taxpayer to abide by that Procedure could only rarely (if ever) give rise to an express or implied deposit "arrangement." The taxpayer in the present case was obviously aware of the applicable Revenue Procedure and expressly invoked that Procedure in electing to make a "payment" rather than a "deposit." See pages 3-4, *supra*. The "facts and circumstances" of this

case thus clearly establish that neither an express nor an implied deposit "arrangment" was made.

e. The correct classification of a remittance as a payment or deposit determines whether the statute of limitations for tax refund claims applies, whether an administrative refund claim must be made before suit is commenced, and whether the taxpayer may recover amounts remitted to the government even though those sums were owed to the government at the time the remittance was made. See pages 11-12, *supra*. The conflicting interpretations that the courts of appeals have adopted of this Court's decision in *Rosenman* result in markedly different application of these basic principles of tax law to otherwise identically situated taxpayers. Resolution of this recurring conflict on these fundamental issues of tax administration is needed to avoid continuing uncertainty and disparate application of the revenue laws.

2. The court of appeals erred in concluding that the Court of Federal Claims has jurisdiction over this case under the Tucker Act. The rationale adopted by the court of appeals in reaching that conclusion misapplies and expands the jurisdictional limitations that apply to all suits in that court for "claim[s] against the United States" (28 U.S.C. 1491(a)(1)). The decision in this case thus involves a matter of the highest recurring importance that warrants this Court's review.

a. The Tucker Act creates jurisdiction in the Court of Federal Claims over claims against the United States for money damages that are "founded either upon" the Constitution, an Act of Congress, a regulation or an express or implied-in-fact contract.

28 U.S.C. 1491(a)(1).[14] No statute, however, provides any mechanism for making or recovering a tax "deposit." The obvious and natural route for the recovery of a "deposit" is therefore to bring a claim either (i) based upon an express or implied-in-fact contractual deposit "arrangement" (as the Court postulated in *Rosenman*) or (ii) based upon the administrative rule that provides for the making and return of a remittance that is expressly identified by the taxpayer as a "deposit" (Rev. Proc. 84-58, *supra*). Neither of those jurisdictional routes is available to respondent, however, for respondent abjured any intent to make a deposit and instead elected affirmatively to make a "payment" of tax (App., *infra*, 32a).

Having made such a "payment," it then became respondent's statutory right to seek a "refund" of the tax. That right is subject, however, to the jurisdictional and substantive limitations applicable to tax refund suits (see pages 11-12, *supra*). Because those limitations were likely to result in the conclusion that no refund was due, respondent has declined to pursue that remedy. See page 12 & note 1, *supra*.

Instead, respondent has pursued, and has persuaded the court of appeals to adopt, a novel jurisdictional theory in this case. The court acknowledged that there is no statutory, regulatory, constitutional or contractual provision that directly authorizes recovery of the asserted "deposit" involved in this case (App., *infra*, 7a). The court noted, however, that *East-*

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[14] The Tucker Act does not, however, create jurisdiction over claims against the United States based upon contracts "implied in law." See, *e.g.*, *United States* v. *Minnesota Mut. Inv. Co.*, 271 U.S. 212, 217-218 (1926); *Merritt* v. *United States*, 267 U.S. 338, 341 (1925).

port S.S. Corp., 373 F.2d 1002, 1007, held that the Tucker Act creates jurisdiction over claims against the United States for money "improperly paid [or] exacted * * * in contravention of a statute" (App., *infra*, 7a).[15] The court reasoned that the money that respondent paid to the United States falls within this jurisdicitional rubric because it was exacted "in contravention of" Section 809 of the Internal Revenue Code—the statute that defines the income tax deduction that respondent invoked in its tax return (App., *infra*, 7a).

b. This reasoning of the court of appeals is illogical on its own terms, misapplies the jurisdictional limits of the Tucker Act and cannot be reconciled with numerous decisions of this Court.

(i) The decision of the court of appeals is illogical on its own terms for two reasons. First, Section 809 of the Code plainly does not authorize any recovery of money against the United States. It is merely one of the hundreds of provisions that establish and define deductions under the Internal Revenue Code; Section 809 simply happens to be the deduction that is at the

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[15] In *Eastport S.S. Corp.* v. *United States*, 372 F.2d at 1007, the Court of Claims concluded that two different kinds of claims may be "founded * * * upon" a federal statute within the meaning of the Tucker Act: (i) those in which money has been "improperly * * * exacted" from the plaintiff by the government "in contravention * * * of a statute" and (ii) those in which no money has been paid to the government but the plaintiff is entitled to obtain damages under a statute that expressly or impliedly confers a right to payment. *Ibid.* The court of appeals reasoned in the present case that respondent's claim was for the recovery of an "illegal exaction" under Section 809 of the Internal Revenue Code and therefore fell within this first category (App., *infra*, 7a-10a).

heart of the substantive tax controversy that lies behind this case. See note 1, *supra*. Second, although the court of appeals held that its jurisdiction rests on the theory that respondent seeks to recover monies "improperly exacted * * * in contravention of" Section 809 of the Code, the court then never addressed whether any money *was* "improperly exacted" under that statute or whether the Service *had* in any manner acted "in contravention of" that statute.[16] Instead, without even considering whether an "improper exaction" had occurred under *any* statute, the court simply awarded recovery on the theory that a "deposit" rather than a "payment" of the liability had occurred "as a matter of law" (App., *infra*, 15a).

By holding that a "deposit" was made "as a matter of law" when, as a matter of fact, the remittance was unquestionably tendered as a "payment" (App., *infra*, 32a), the Federal Circuit has erroneously circumvented a fundamental limitation on the jurisdiction of the Court of Federal Claims. A claim against the United States that is based upon a "business transaction" or a commercial "arrangement" (*Rosenman* v. *United States*, 323 U.S. at 662) must be based upon an express or implied-in-fact undertaking of the government. The Tucker Act does not create jurisdiction over claims that are "based merely on equitable considerations and implied in law." *United States* v. *Minnesota Mutual Investment Co.*, 271 U.S. 212, 217 (1926); see note 14, *supra*.

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[16] Indeed, the interpretation of Section 809 that the Service has adopted has been upheld by every court that has addressed it. See note 1, *supra*. It is thus respondent, not the Service, that acted "in contravention of" the statute—by claiming a deduction to which it was not entitled.

(ii) These logical defects in the court's reasoning are at the heart of its analytical error. Not every claim "founded upon" the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. That Act creates no substantive right enforceable against the United States for damages. *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983); *United States* v. *Testan*, 424 U.S. 392, 398 (1976). Instead, the right to recover must be found in some other statute that may "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States* v. *Mitchell*, 463 U.S. at 218; *United States* v. *Testan*, 424 U.S. at 400. See also *Army & Air Force Exch. Ser.* v. *Sheehan*, 456 U.S. 728, 739 (1982) ("jurisdiction * * * cannot be premised on the asserted violation of [laws] that do not specifically authorize awards of money damages").

Congress has in fact provided an express statutory scheme that mandates compensation by the United States for taxes "erroneously or illegally assessed or collected" under the internal revenue laws. 26 U.S.C. 7422(a). The Court of Federal Claims has jurisdiction, concurrent with the district courts, over actions for the recovery of "any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws" (28 U.S.C. 1346(a)(1)). That statutory remedy, however, is subject to express statutory limitations. For example, under Section 7422 of the Internal Revenue Code, suit may not be brought "in any court" for the recovery of "*any internal revenue tax* alleged to have been erro-

neously or illegally assessed or collected * * * *or* of *any sum* alleged to have been excessive or in any manner wrongfully collected" until the taxpayer has filed an administrative refund claim with the Secretary in accordance with the requirements of Section 6511 of the Code. 26 U.S.C. 7422(a) (emphasis added). See also page 11, *supra*. Respondent did not comply with the express limitations on this statutory scheme for the recovery of "any tax" or "any sum" wrongfully collected under the internal revenue laws. Moreover, even if respondent *had* complied with those limitations, it would not have been entitled to a remedy in this case because the "tax" or "sum" that it tendered did not exceed the amount that it owed at the time that the payment was made. See *Lewis* v. *Reynolds*, 284 U.S. at 283; page 12 & note 1, *supra*.

By holding that the Tucker Act provides a remedy for recovery of an amount "illegally exacted" under the revenue laws—and that this remedy exists wholly apart from the specific statutory remedy that Congress has provided for recovery of a "tax" or "sum" "in any manner wrongfully collected" under the internal revenue laws (28 U.S.C. 1346(a)(1))—the decision in this case deprives the specific rules that Congress enacted to govern tax controversies of meaning. This Court has emphasized that the statutory limitations on taxpayer suits are an indispensable component—indeed, "a keystone"—of the "carefully articulated and quite complicated structure of tax laws" that Congress has enacted. *Flora* v. *United States*, 362 U.S. at 157. See also *United States* v. *Kales*, 314 U.S. 186, 197-200 (1941). The Court has therefore strictly construed and strictly enforced the administrative refund claim requirement and the time and recovery limitations that govern tax refund suits.

See, *e.g.*, *Brockamp* v. *United States*, 117 S. Ct. 849 (1997); *United States* v. *Dalm*, 494 U.S. 596 (1990). Under the novel approach adopted by the court of appeals in this case, however, a taxpayer may circumvent these restrictions on suit simply by alleging that the government has misapplied a substantive tax provision and thereby compelled an "illegal exaction" of tax (App., *infra*, 15a). The decision in this case would thus permit a remedy for an "illegal exaction" under the Tucker Act even though that remedy would be precluded by the express limitations Congress has enacted to govern claims that a tax or "any sum" was "in any manner wrongfully collected" under the internal-revenue laws (26 U.S.C. 7422(a)).

If, as the court of appeals held in this case, an "illegal exaction under Section 809" gives rise to a Tucker Act claim, so too presumably would any similar receipt of a tax payment made under protest based upon any other substantive section of the Internal Revenue Code. Tax controversies arising under provisions that authorize or limit deductions, that define items of income, that determine the rate or timing of tax or the year in which income is recognized, that determine whether an item of income (or a deduction) is ordinary or capital in nature—in short, controversies arising under *any* substantive tax provision—all could be brought in the Court of Federal Claims under the extraordinary and unprecedented rationale applied by the court in this case. The specific limitations that Congress has imposed on the specific forms of action that it has authorized for tax refund suits would thereby be made meaningless. For example, the statutory requirement of an administrative refund claim (26 U.S.C. 7422(a)) would become irrelevant—as it was thought to be irrelevant by the

court in this case. Similarly, on the rationale applied in this case, tax refund cases brought under the Tucker Act as "illegal exaction" cases (App., *infra*, 7a) would be free of the statute of limitations that applies to refund suits. Thus, instead of the requirement that a suit to recover a tax be brought within two years after the date that the administrative refund claim is disallowed (26 U.S.C. 6532(a)), the taxpayer's action would be subject only to the general six-year statute of limitations that applies to claims "over which the United States Court of Federal Claims has jurisdiction." 28 U.S.C. 2501.

In short, the court of appeals has erroneously interpreted the Tucker Act to establish a new, non-statutory device for pursuing and litigating tax controversies in the Court of Federal Claims. The holding that the Tucker Act provides jurisdiction for a claim against the United States based upon an "illegal exaction" of taxes under the Internal Revenue Code destroys the carefully crafted statutory framework that Congress has devised for the recovery of "any tax" or "any sum" erroneously assessed or collected by the United States (26 U.S.C. 7422). When, as in the case of tax controversies, Congress has provided "in great detail the protections and remedies applicable to such action," resort to alternative non-statutory theories of relief under the Tucker Act is not proper. *United States* v. *Fausto*, 484 U.S. 439, 443 (1988).

Review by this Court of the decision in this case is needed to avoid the certain confusion that will otherwise result for the most routine aspects of tax administration. Under the decision of the court of appeals, tax refund cases now have both a statutory and a non-statutory route for adjudication. Neither

taxpayers nor the United States can now know with certainty where and how tax controversies will be determined.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 96-5052

NEW YORK LIFE INSURANCE COMPANY,
PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

Decided: July 3, 1997

Before: LOURIE, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and RADER, *Circuit Judge*.

Opinion for the court filed by *Senior Circuit Judge* FRIEDMAN. Dissenting Opinion filed by *Circuit Judge* RADER.

FRIEDMAN, *Senior Circuit Judge*.

The question on the merits is whether money remitted to the Internal Revenue Service (the Service) constituted a "deposit" or a "payment" of taxes. If a deposit, the taxpayer is entitled to recover it; if a payment, the taxpayer can recover the money only after it files a claim with the Service for the return of an "overpayment." The Court of Federal Claims held that it had jurisdiction over this suit for recovery of the remitted money and that the remittance was a deposit, which the taxpayer was entitled to recover. We affirm both rulings.

I.

In computing its taxable income for 1987, the appellee New York Life Insurance Company (N.Y. Life or the Company) used a negative recomputed differential earnings rate (negative rate). Under section 809(a) of the Internal Revenue Code (the Code), 26 U.S.C. § 809(a) (1994), the "differential earnings amount" is the amount by which mutual life insurance companies must reduce the deductions for dividends to policy holders authorized by section 808 of the Code. The differential earnings amount is determined by multiplying the differential earnings rate by the life insurance company's equity base. *Id.*; *see American Mut. Life Ins. Co. v. United States*, 43 F.3d 1172 (8th Cir. 1994) (analyzing and clarifying the complex financial calculations involved in section 809), *cert. denied*, 116 S.Ct. 335 (1995). The Company's use of the negative rate generated a net operating loss for 1987, which NY Life carried back to 1984.

Upon audit, the Service proposed adjustments for 1984, 1985, 1986 and 1987, including a disallowance of the 1987 loss (resulting from use of the negative rate), because a negative rate was not allowable. The effect was to increase the Company's taxable income for that year and thereby eliminate the loss carried back to 1984, resulting in a tax increase of $19,386,791 for 1984. In August, 1992, the Service sent NYLife a notice of adjustment of 1984, 1985, 1986, and 1987 taxes (a thirty-day letter). NYLife protested the proposed adjustments, and the Service reviewed the matter further.

During the review period, NYLife executed an extension of time for assessing the 1987 tax to Sep-

tember 30, 1994, which also extended the time for assessing the 1984 proposed deficiency resulting from the elimination of the loss carried back to that year. *See* 26 U.S.C. § 6501(h) (1994). In November, 1993, NYLife and the Service reached a tentative settlement for both 1984 and 1987 (and for two other years), under which the Company would pay the deficiency but retain the right to prosecute a refund claim.

On December 17, 1993, NYLife sent the Service three checks "in payment of additional income tax and interest accrued thereon for the tax years" 1984, 1986 and 1987. The check for 1984 was for $31,912,823, of which NYLife requested that $19,374,668 be allocated to additional tax and the balance of $12,538,155 to interest on that additional tax. The Company stated that the portion of the payment representing the additional tax "is based on a tentative settlement" with the Service.

In March and May, 1994, NYLife submitted to the Service executed forms waiving restrictions on assessment for the years the proposed settlement covered, and stating the terms of the settlement. In those forms the Company "reserve[d] the right to timely file claims for refund or credit or to prosecute timely filed claims for the years 1984, 1986, 1987 and 1988" on specified grounds, including that it was "entitled to the allowance for 1984 of a net operating loss carryback . . . attributable to a net operating loss which arises in 1987." The forms' cover letters stated: "[T]he Company reserves the right to claim a refund of tax with respect to two issues, the negative recomputed DER. . . ."

Although the Service timely assessed deficiencies for at least NYLife's 1987 taxes, it never assessed

any deficiency for 1984. On September 30, 1994, the statute of limitations on making that assessment expired.

NYLife's complaint in the Court of Federal Claims, filed October 31, 1994, sought recovery of the $31,912,823 it had remitted to the Service to cover the asserted tax deficiency (plus interest) for 1984, resulting from the Service's disallowance of the 1987 negative rate. On cross-motions for summary judgment, the court denied the government's motion, granted the plaintiff's motion and entered judgment for the plaintiff of $31,912,823 with no interest.

The court held that under *Cohen v. United States*, 995 F.2d 205 (Fed. Cir. 1993) (discussed in part III, below), the money NYLife had remitted to the Service constituted a deposit, and not a payment, of tax which the plaintiff was entitled to recover. The court rejected the government's contention that the court lacked jurisdiction because NYLife had not filed a refund claim before filing suit. It held that the refund claim provision, 26 U.S.C. § 7422(a) (1994) (discussed in part II below), upon which the government relied, was inapplicable to NYLife's remittance because NYLife sought "recovery of a remitted deposit rather than a refund of taxes paid," a claim which the court ruled was outside the scope of that provision.

II.

A. NYLife invoked the jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, which gives that court

> jurisdiction to render judgment upon any claim against the United States founded either upon the

> Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (1994).

"The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). In *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967), the Court of Claims, in discussing the Tucker Act (which then was that court's jurisdictional font), stated:

> But it is not every claim involving or invoking the Constitution, a federal statute, or a regulation which is cognizable here. The claim must, of course, be for money. Within that sphere, the non-contractual claims we consider under Section 1491 can be divided into two somewhat overlapping classes—those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury. In the first group (where money or property has been paid or taken), the claim must assert that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.

Id. at 1007 (footnote omitted).

The court further stated that "[m]onetary claims which cannot be brought within these limits are beyond this court's jurisdiction, even though they may intimately involve the Constitution, an Act of Congress, or an executive regulation." *Id.* at 1008 (footnote omitted).

In *Testan*, the Supreme Court apparently approved the Court of Claims' assertion of its jurisdiction over claims seeking return of money paid to the government. In holding that the Court of Claims did not have jurisdiction over a suit by federal civil service employees seeking reclassification of their positions to a higher grade and back pay for the differential in pay between the two grades, the Court pointed out that because the employees

> do not rest their claims upon a contract [or] seek the return of money paid by them to the Government [i]t follows that the asserted entitlement to money damages depends on whether any federal statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."

Testan, 424 U.S. at 400 (quoting *Eastport*, 372 F.2d at 1009). The Court reiterated that principle on the next page when it stated: "Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim . . . does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis," which was followed by the "can fairly be interpreted" language quoted above. *Testan*, 424 U.S. at 401-02. These two statements appear to reflect the Supreme Court's approval of the *Eastport* statement that the Court of Claims had jurisdiction

over suits seeking the return of money improperly paid to, exacted or retained by the government.

In the present case, NYLife sought "the return of money paid by [it] to the Government" in connection with a tentative settlement of the government's claim that it owed additional taxes for 1984. The Company contended that its use of the negative rate for 1987 was permissible under section 809 of the Internal Revenue Code, and that the government's disallowance of the 1984 carryback loss was improper. In the language of *Eastport*, NYLife's claim in the Court of Federal Claims "assert[ed] that the value sued for [the amount remitted] was improperly paid [or] exacted . . . in contravention of . . . a statute [namely, 26 U.S.C. 809]." "The claim is based on the allegedly erroneous interpretation of a statute by the agency." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1579-80 (Fed. Cir. 1996) (Nies, J. concurring). The complaint accordingly stated a claim over which the Court of Federal Claims had jurisdiction.

The Code does not deal with deposits of taxes or provide procedures for their making or recovery. The concept of a "deposit" of taxes, which is not a payment, stems from the Supreme Court's decision in *Rosenman v. United States*, 323 U.S. 658 (1945). There the executors of an estate delivered to the Service a check "as a payment on account of the Federal Estate tax. . . . This payment is made under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the executors that not all of this sum is legally or lawfully due." *Id.* at 660. The Supreme Court rejected the government's contention that this

remittance was a tax "payment," and ruled that the money was "held not as taxes duly collected are held but as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due." *Id.* at 662. The Court stated that

> the true nature of an arrangement such as this [is] to treat it as an estimated deposit and not as a payment which, if in excess of what should properly have been exacted, entitled the taxpayer to interest as the return on the use that the Government has had of moneys that should not have been exacted.

Id. at 663.

Since that time the courts consistently have recognized that a remittal of money against an assessed or likely tax liability may, depending upon the circumstances, constitute either a payment or a deposit of taxes and that, if the latter, the taxpayer is entitled to its return. *See, e.g., Moran v. United States*, 63 F.3d 663, 665-66 (7th Cir.1995) (discussing the cases dealing with the deposit/payment dichotomy, holding that the particular remittance a taxpayer had made was a payment rather than a deposit, and stating that the court "disagree[d] with the implications of the Federal Circuit's conclusion in *Cohen* that the decision to dispute a liability necessarily signifies an intent not to make a payment on that liability." *Id.* at 669 (footnote omitted)).

Here, as shown above, NYLife sought the return of money it had remitted to the Service, pursuant to a tentative settlement with the Service, of the Company's tax liability under section 809 of the Code. In the suit NYLife necessarily contended that the

money was "improperly paid [or] exacted . . . in contravention of . . . a statute," *Eastport*, 372 F.2d at 1007, because it did not owe the money. If, as we hold in part III, the money was a deposit, NYLife may maintain a Tucker Act suit in the Court of Federal Claims for its recovery.

The dissent denigrates the statements in *Eastport* on which we rely by repeatedly calling them dicta. However one describes them, they were not something casually tossed off, but were an integral and important part of the Court of Claims' attempt in that case to summarize and restate the established principles governing its Tucker Act jurisdiction. The court's jurisdictional discussion in *Eastport* was intended to provide the standards and guidelines that the Court of Claims followed. As such, even though some aspects of the analysis may be characterized as dictum rather than holding, it is appropriate to follow and apply the stated principles in determining the jurisdiction of the Court of Federal Claims under the Tucker Act. Courts frequently and properly cite and rely upon dicta that correctly set forth governing or relevant legal principles.

The dissent argues that sovereign immunity precludes the Court of Federal Claims from entertaining NYLife's suit. The dissent states that the "United States, as sovereign, is immune from suit unless it expressly waives its immunity"; that in 28 U.S.C. § 1346, discussed below, Congress has "provided a clear remedy to recover taxes paid without legal basis"; and that because there is no statute expressly waiving sovereign immunity for a suit to recover money deposited to cover an asserted tax deficiency, sovereign immunity bars this suit.

In the Tucker Act Congress gave the Court of Federal Claims "jurisdiction to render judgment upon any claim against the United States" within the categories there specified. In authorizing that court to enter judgment against the United States, Congress waived sovereign immunity for those "claims" that the statute enables the court to entertain. *See United States v. Mitchell*, 463 U.S. 206, 215-16 (1983) (explaining that "[f]or decades this Court consistently interpreted the Tucker Act as having provided the consent of the United States to be sued *eo nomine* for the classes of claims described in the Act" and noting that although in *Testan* "this Court employed language suggesting that the Tucker Act does not effect a waiver of sovereign immunity" such "isolated language should be disregarded.") The question therefore is not whether Congress has waived sovereign immunity for a suit to recover a deposit of taxes, but whether a plaintiff who has made such a deposit has a "substantive right enforceable against the United States for money damages." *Testan*, 424 U.S. at 398. *Eastport* teaches that where the claim is that money "was improperly paid, exacted or taken from the claimant in contravention of . . . a statute [here section 809 of the Code]," the Court of Federal Claims may entertain the suit. *Eastport*, 372 F.2d at 1007. As we have explained that is precisely the situation here.

B. The government contends, however, that NYLife's failure to file with it a claim for refund of the amount remitted barred the Court of Federal Claims from exercising its jurisdiction to adjudicate

NYLife's claims for recovery of the remittance. It relies upon section 7422(a) of the Code, which provides:

> § 7422. Civil actions for tax refund
>
> (a) No suit prior to filing claim for refund
>
> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary. . . .

26 U.S.C. § 7422 (1994).

In *Schenley Import Corp. v. United States*, 121 F. Supp. 646 (1953), liquor importers remitted money to the United States to secure the payment of customs duties and taxes before they were due. The importers remitted more money than it turned out they actually owed. When they sued to recover the excess, the government argued that their failure to file a timely refund claim barred recovery under section 3313 of the Code, which contained the identical operative language as present section 7422: "internal revenue tax alleged to have been errone-ously or illegally assessed, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected."

The Court of Claims rejected the government's contention. It stated:

> We do not think that the funds here in question fit the language of the statute. They were money deposited with the Government for its security to create a fund out of which taxes could be paid as they came due. The taxes were paid out of it and the Government owed the rest of it to the plaintiffs, not as an excess collection of taxes or penalties, but as money not required to pay the plaintiffs' taxes. . . .

Schenley, 121 F.Supp. at 648. *See also Compania Ron Carioca Destileria, Inc. v. United States*, 168 F.Supp. 546, 548 (Ct. Cl. 1958) ("[A] payment . . . of taxes expected to accrue in the future could not have been a payment of taxes 'erroneously or illegally assessed or collected,' for the collection of which plaintiff could have filed a claim for a refund.")

In light of our holding in part III, below, that the money NYLife remitted to the Service was a deposit and not a payment of taxes, the deposit was made to cover "a payment . . . of taxes expected to accrue in the future," upon assessment, and was not "a payment of taxes 'erroneously or illegally assessed, or collected.'" As the government recognized in its brief, since "the administrative claim required by I.R.C. § 6511(a) is a claim for an 'overpayment,' and that recovery is limited by I.R.C. § 6511(b)(2) to amounts 'paid' within specified periods prior to the claim, a refund suit is necessarily predicated on the existence of a tax 'payment.'" Accordingly, the requirement in section 7422(a) that no suit for "recovery of any internal revenue tax" "shall be maintained" until a refund claim has been filed, does

not apply to the suit brought by NYLife since it was not a suit for the return of a tax payment.

That conclusion accords with the purpose underlying the requirement of filing a refund claim, which "is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue. . . . It is the rejection [of the claim] which makes the suit necessary." *See Alexander Proudfoot Co. v. United States*, 454 F.2d 1379, 1383 (Ct. Cl. 1972) (quoting *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272-73 (1931)). The refund claim requirement "is designed both to prevent surprise and to give adequate notice to the Service of the nature of the claim . . . thereby permitting an administrative investigation and determination." *See Proudfoot*, 454 F.2d at 1383 (quoting *Union Pacific R.R., Co. v. United States*, 389 F.2d 437, 442 (Ct. Cl. 1968)). Here there was no need to give the Service the opportunity to reexamine the merits issue, since NYLife had the right to a return of its deposit whenever it wished.

III.

On the merits, *Cohen* controls this case. There, on substantially identical facts, this court held that a similar remittal of funds was a deposit and not a payment.

In *Cohen*, following receipt of a ninety-day letter in which the Service proposed to disallow a deduction that the Cohens had taken on their federal income tax and impose a deficiency, and after the Cohens had filed a petition in the United States Tax Court contesting the deficiency, the Cohens sent the Service a check "in partial payment of the proposed deficiency," which

divided the payment between the "tax deficiency and interest thereon." *Cohen*, 995 F.2d at 206 n.6. After the statute of limitations had run, the Service assessed a deficiency.

The Cohens filed with the Service a claim for refund of the amount remitted. After the Service failed to act on the claim for six months, the Cohens filed suit in the United States Claims Court for the money. That court granted summary judgment for the Cohens and this court affirmed.

Noting that the Cohens consistently had protested the proposed deficiency and that "the assessment was not made within the clear boundaries of time imposed by law or openly agreed to by the parties," the court held that "the consequences are that the transfer of funds was a deposit as a matter of law, whether for purposes of refund, imposition of interest, or otherwise." *Id.* at 209. The first sentence of the "Conclusion" of the opinion was as follows:

> The remittance made by the Cohens, under protest, after a notice of deficiency but in clear circumstances of contest prior to expiration of the period for assessment, was a deposit as a matter of law.

Id.

The significant operational facts in the present case relating to whether NYLife's remittance was a deposit or a payment are indistinguishable from those in *Cohen*. Here, as in *Cohen*, (1) the taxpayer received a letter from the Service proposing to assess a deficiency, (2) the taxpayer remitted money to the Service which it described as a "payment" of additional tax and which allocated the money between tax

deficiency and interest thereon, (3) the taxpayer had protested the proposed deficiency and, in making the remittance, had reserved the right to seek recovery of the additional tax and (4) the Service failed timely to assess the additional tax deficiency. This case comes squarely within the ruling of *Cohen* that "[t]he remittance [it] made . . . under protest, after a notice of deficiency but in clear circumstances of contest prior to expiration of the period of assessment, was a deposit as a matter of law." *Id.*

The government points to the statement in *Cohen* that in *Charles Leich & Co. v. United States*, 329 F.2d 649 (Ct. Cl. 1964) the Court of Claims, in determining that a taxpayer's remittance was a deposit and not a payment, "examined the particular facts and circumstances of the case in reaching this conclusion." *Cohen*, 995 F.2d at 208. It then argues that the "particular facts and circumstances" in the present case distinguish it from *Cohen*. That argument ignores the holding in *Cohen* that the taxpayer's remittance, made under protest following a notice of deficiency and that reserved the right to seek return of the money, and the Service's failure timely to assess the deficiency, made the remittance a deposit "as a matter of law." Indeed, this is a stronger case than *Cohen* for treating the transmittal as a deposit, since there the Service made an untimely assessment, whereas here it made no assessment at all.

Finally, the government suggests that if *Cohen* requires the conclusion that NYLife's remittance was a deposit, this court should revisit *Cohen* and modify or overrule it. It recognizes that to do so would require in banc action. The government did not seek rehearing in banc in *Cohen*, and it gives no

reason why such step would be more appropriate now that it would have been then. There is no showing that the question is of sufficient importance to warrant in banc reconsideration of this recent decision, and the panel sees no occasion to recommend to the full court that it take that action.

The government states that the Court of Federal Claims' decision is vulnerable because it permitted NYLife to recover its remittance without consideration of the merits of the negative rate issue (which underlay the increased liability). It contends that this result is contrary to "a basic principle of tax law—*i.e.*, that a taxpayer cannot recover taxes collected within the period of assessment unless the taxpayer establishes that the United States was not entitled to the money." That argument, however, could be made in every case in which recovery of a deposit of taxes is sought and the time for assessment has expired, since the essence of a deposit is that the taxpayer is entitled to recover it without regard to the merits of the underlying tax claim. The government can avoid this situation by making a timely assessment of the tax deficiency, which would assure it the right to litigate the merits of the deficiency.

CONCLUSION

The judgment of the Court of Federal Claims granting summary judgment for the plaintiff is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 96-5052

NEW YORK LIFE INSURANCE COMPANY,
PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

RADER, *Circuit Judge*, dissenting.

The Tucker Act does not permit this court to address this case without sending New York Life Insurance Company back to bring a proper tax refund action. Repeatedly the Supreme Court has clarified that this court may not imply a waiver of sovereign immunity. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. King*, 395 U.S. 1, 4 (1969). Instead each litigant seeking recovery of money from the United States must show an express waiver of sovereign immunity which confers the right to bring the suit. New York Life did not show the required express waiver of sovereign immunity which defines the jurisdiction of the United States Court of Federal Claims. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Mitchell*, 445 U.S. at 538.

I.

The Internal Revenue Service (IRS) notified New York Life of a 1984 tax liability. After protracted negotiations with the IRS, New York Life agreed to a settlement in late 1993. In a November 1993 letter

memorializing the settlement, New York Life agreed that "[t]he Company *will pay the tax* with respect to this adjustment and reserve the right to prosecute *a refund claim therefor*." (Emphasis supplied.) In accordance with this agreement, New York Life freely and voluntarily paid nearly $32 million in December 1993. The letter accompanying the money referred to this transaction six times as a "payment" of taxes. According to the taxpayer's instructions, the IRS credited part of the payment to interest, which New York Life later deducted. New York Life no doubt made this payment because it knew that the United States had statutorily waived sovereign immunity for tax refund suits, 26 U.S.C. § 7422, in the Court of Federal Claims, 28 U.S.C. § 1346(a)(1). Indeed in 1995, the taxpayer filed an administrative claim in preparation for a tax refund suit.

The IRS did not formally assess the 1984 tax within the time limits. New York Life immediately brought a claim in the Court of Federal Claims for recovery of its "deposit" without seeking a refund of taxes. Before determining whether New York Life made a payment or a deposit, however, this court must first establish jurisdiction to reach the merits. Jurisdiction, in turn, raises the fundamental defining question: Other than as a tax refund action, where has the United States waived sovereign immunity for a suit to recover money paid as taxes?

II.

The United States, as sovereign, is immune from suit unless it expressly waives its immunity. *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986); *Sherwood*, 312 U.S. at 586. Claims for money from

the United States therefore must include a specific reference to a statute that gives consent for the suit. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983); *Mitchell*, 445 U.S. at 538. New York Life invokes only the Tucker Act as its waiver of sovereign immunity.

The Tucker Act, however, standing alone does not waive sovereign immunity for a suit against the United States. *Mitchell*, 445 U.S. at 538. Rather, as the Supreme Court has repeatedly clarified, the Tucker Act is merely a jurisdictional statute. *Id.* Claimants against the United States "must look beyond the jurisdictional statute [the Tucker Act] for a waiver of sovereign immunity with respect to their claims." *Id.* Without a statute "unequivocally express[ing]" a waiver of sovereign immunity, *King*, 395 U.S. at 4, New York Life simply cannot entertain its action in the Court of Federal Claims. The Tucker Act, on which New York Life relies as a waiver of immunity, confers no substantive right to sue the United States, and consequently, does not waive sovereign immunity. *Sherwood*, 312 U.S. at 586-88. New York Life fails the most elemental test for a non-contract claim under the Tucker Act: it does not invoke a money-mandating statute to open the sovereign immunity door to the Court of Federal Claims.

III.

Desperate to find some path into the Court of Federal Claims without an express waiver of sovereign immunity, New York Life reaches for the "illegal exaction" dicta from *Eastport Steamship Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967). Although the illegal exaction notion often appears in

cases before Court of Federal Claims,[1] this court has never considered how sovereign immunity provides jurisdiction for the *Eastport* dicta about illegal exaction. Without any reasoning to show the consent of the United States to such a suit, this court's predecessor suggested that the Tucker Act waives immunity when "the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." 372 F.2d at 1007.

Although never expressed, the apparent reasoning of the Court of Claims in 1967 was that the United States Code would not create a statutory or regulatory regime without providing a remedy for recovery of money exacted under an illegal application of those laws or regulations. The most elemental problem with the illegal exaction dicta and its unspecified reasoning is that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *King*, 395 U.S. at 4. The mere implication that the United States would not in fairness retain illegally exacted funds does not create a remedy or waive sovereign immunity.

In this case, however, this court need not struggle to find a waiver of sovereign immunity for the illegal exaction notion because the United States Code has already provided a clear remedy to recover taxes paid

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[1] *See, e.g., Crocker v. United States*, 37 Fed. Cl. 191, 197-99 (1997); *Bowman v. United States*, 35 Fed. Cl. 397, 400-01 (1996); *ABN Amro Bank N.V. v. United States*, 34 Fed. Cl. 126, 136 (1995); *El Dorado Springs v. United States*, 28 Fed. Cl. 132, 135 (1993); *Merck & Co., Inc. v. United States*, 24 Cl.Ct. 73, 78 (1991); *Lark v. United States*, 17 Cl.Ct. 567, 569 (1989); *Passaro v. United States*, 4 Cl.Ct. 395, 397 (1984).

without legal basis. Indeed 28 U.S.C. § 1346 expressly waives sovereign immunity and provides jurisdiction for recovery of funds paid as taxes. With a remedy in place, New York Life has a legal recourse to recover funds, even if "improperly paid, exacted, or taken" and cannot argue that fairness compels this court to imply a waiver of sovereign immunity. In sum, either because a single sentence of dicta in a 1967 Court of Claims opinion cannot grant (unequivocally or otherwise) the consent of the United States or because no illegal exaction takes place in the face of an express statutory remedy for recovery of funds, New York Life has not answered the first question for any suit in the Court of Federal Claims: where is the waiver?

Even if judicial fiat could waive the immunity of the United States, the *Eastport* illegal exaction dicta would not suffice because it is not even a court order, judgment, or holding. The holding of *Eastport* rests on familiar sovereign immunity principles. *Eastport* stands for the proposition, since many times repeated by the Supreme Court, *see, e.g.*, *Mitchell*, 445 U.S. at 538, *United States v. Testan*, 424 U.S. 392, 401-02 (1975), that not every violation of a federal statute waives sovereign immunity and gives access to the Court of Claims under the Tucker Act, but only the violation of statutes mandating the payment of money damages. 372 F.2d at 1007-08. In fact, in *Eastport*, the Court of Claims held that it could "not evade these [sovereign immunity] barriers by incorporating into Section 9 [of the Shipping Act] something which is not there, either in terms or by fair implication—a mandate for compensation." 372 F.2d at 1011. Because the Shipping Act did not mandate the payment

of damages, the shipping company could not entertain a suit in the Court of Claims.

Thus, the rule in *Eastport* differs drastically from its illegal exaction dicta. Similarly, the Supreme Court in *Testan*, citing *Eastport*, referred to the *Eastport* dicta, but held that the Tucker Act does not operate to waive sovereign immunity. 424 U.S. at 400-01. To the extent that the dicta in *Eastport* or *Testan* created any ambiguity on this fundamental point, the Supreme Court clarified it in *Mitchell*:

> The individual claimants in this action premised jurisdiction in the Court of Claims upon the Tucker Act. . . . The Tucker Act is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States. . . ." The individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity with respect to their claims.

445 U.S. at 538. Under the *Eastport/Testan/ Mitchell* rule (as opposed to the dicta), the question remains: where is the waiver for New York Life's claim?

In one sense, this court's opinion could have stopped after saying: "The Code does not deal with deposits of taxes or provide procedures for their making or recovery." If the United States Code has not waived sovereign immunity for recovery of deposits as this passage seems to concede, where is the waiver? New York Life thinks the waiver is in the Tucker Act standing alone, but the rule in *Mitchell*, as applied by both *Eastport* and *Testan*, requires a money-mandating statute in addition to the Tucker Act. Where is that waiving statute?

In another sense, this court's statement above that the Code provides no procedures for recovery of money paid as taxes cannot be correct. Even New York Life has taken steps to institute a tax refund action under 28 U.S.C. § 1346. These facts illustrate the stark contradictions in New York Life's contentions. It acknowledges that the United States has waived immunity in supplying a procedure for recovery of money paid as taxes. Yet it refuses in this action to pursue that proper legal course.

On still another level, New York Life has not shown that it even fits within the illegal exaction dicta of *Eastport*. As noted before, to fit within this dicta, a claimant "must assert that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." 372 F.2d at 1007. In the first place, New York Life makes no showing that the IRS improperly exacted or that it improperly paid its 1984 tax liability in 1993. To the contrary, New York Life freely paid the liability after extensive negotiations. The facts disclose no improper payment or exaction, only a voluntary payment of taxes. New York Life indeed reserved the right to bring a tax refund action, but that is not this claim. Moreover the IRS contravened no law. The IRS merely accepted money freely paid. What law did the IRS contravene by accepting payment under a settlement agreement? The question remains: where is the waiver?

IV.

This dissent recognizes the reasons that New York Life seeks to escape the strictures of sovereign immunity. Fairness and equity cry out for a taxpayer to recover its money if a later determination shows no taxes were due at the time of payment. The noble objective of fairness cannot trump, however, the legal processes for achieving that fairness. The United States Code has established a due legal process to provide fairness to New York Life and other taxpayers. Under that process, a taxpayer can indeed recover overpayments or unnecessary payments by filing an administrative tax refund claim, *see* 26 U.S.C. § 6511, and a tax refund suit at the Court of Federal Claims, if necessary. Indeed New York Life has followed that procedure and has pending a claim which has followed the proper legal course to recover any funds it paid without owing.

In other words, New York Life is already guaranteed everything it expressly bargained for and agreed to in its settlement with the IRS—a right to file a tax refund suit under statutes that properly waive sovereign immunity to suit in the Court of Federal Claims. Meantime New York Life should not presume to ignore the doctrines of sovereign immunity, which form the basis of jurisdiction under the Tucker Act. For this suit, New York Life has yet to answer the question: where is the waiver?

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 96-5052

NEW YORK LIFE INSURANCE COMPANY,
PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

[Filed: Sept. 26, 1997]

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on October 3, 1997.

Circuit Judge GAJARSA did not participate in the vote.

FOR THE COURT,
JAN HORBALY, CLERK

Dated: September 26, 1997

By /s/ ALEX VAN VEEN
ALEX VAN VEEN
Staff Law Clerk

cc: GARY R. ALLEN
ARTHUR L. BAILEY

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

APPENDIX B

UNITED STATES COURT
OF APPEALS FOR THE FEDERAL CIRCUIT

No. 94-960T

NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Filed: [November 14, 1995]

OPINION

Arthur L. Bailey, Washington, D.C., attorney for plaintiff. *J. Walker Johnson, Gerald Kaplan, Michael M. Oleska*, and *Steptoe & Johnson*, of counsel.

Robert Stoddart, Department of Justice, Washington, D.C., with whom was *Assistant Attorney General Loretta C. Argrett*, for defendant. *Mildred L. Seidman*, Chief, Court of Federal Claims Section, and *David Gustafson*, Assistant Chief, of counsel.

FUTEY, *Judge*.

This tax case is before the court on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment. Plaintiff seeks to recover $31,912,823 it remitted to the Internal Revenue Service (IRS) on December 17, 1993. Plaintiff claims that the remittance was a deposit and concludes that defendant is obligated to return it. Defendant, on the other hand, contends that the remittance was a payment, which need not be refunded.

Factual Background

On August 17, 1992, the IRS, on behalf of the defendant, United States, proposed adjusting plaintiff's tax liability for the years 1984 through 1987. Plaintiff, New York Life Insurance Company, formally protested the adjustments on September 11, 1992. One of the tax issues involved plaintiff's computation of the "differential earnings rate" (DER) for 1987. Based on its 1987 DER calculation, plaintiff claimed a loss carryback to 1984. Defendant's adjustment proposed disallowing this 1984 carryback. As the parties negotiated the tax issues during 1993, plaintiff consistently expressed its intent to litigate the DER issue.

On December 17, 1993, plaintiff remitted a check for $31,912,823 pursuant to the settlement negotiations. Along with the check plaintiff sent a remittance letter explaining that the remittance was "payment" for income tax and accrued interest for 1984 based on a tentative settlement. Plaintiff's letter further instructed defendant to consider the remittance to be

a "partial payment, pursuant to Section 4.03 of Rev. Proc. 84-58," of the tax. Revenue Procedure Rule 85-58 states in pertinent part:

> A partial remittance will not be treated as a partial payment of tax unless the taxpayer specifically designates what portion of the proposed liability the taxpayer intends to satisfy.

In compliance with this rule, plaintiff explained how to divide this "partial payment" between interest and the underlying tax. Defendant posted plaintiff's remittance as an advanced payment. Plaintiff's 1993 tax return claimed a deduction for the portion of the remittance that applied to the interest.

Plaintiff's remittance letter also renewed the protest over its 1984 tax liability involving the DER issue. Correspondence with defendant in early 1994 once again indicated plaintiff's intent to litigate the DER issue. The IRS never assessed plaintiff's tax liability for 1984 and the statute of limitations period for doing so expired on September 30, 1994. Plaintiff filed suit in this court on October 31, 1994.

Discussion

I. Summary Judgment

Summary judgment is appropriate when the pleadings raise no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. RCFC 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party bears the burden of establishing an absence of evidence to support the non-movant's case. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The party

opposing summary judgment has the burden of showing sufficient evidence, not necessarily admissible, of a genuine issue of material fact in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Any doubt over factual issues must be resolved in favor of the party opposing summary judgment, *Litton Indus. Prod., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985), to whom the benefit of all presumptions and inferences run. *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985). In the instant case, the parties do not dispute the facts as they relate to the payment versus deposit issue. The only issue before the court is the characterization of the remittance, which is a question of law. *Fisher v. United States*, 28 Fed. Cl. 88, 90 (1993). Therefore, summary judgment is appropriate in this case.

II. Payment versus Deposit

Plaintiff argues that its remittance was a deposit, focusing on the fact that it contested tax liability before, during, and after remittance. Defendant asserts that other factors, such as plaintiff's reference to Rev. Proc. 84-58, indicate that plaintiff's remittance was a payment.

If a taxpayer remits money as a payment, the government may retain the money despite the lack of assessment. If, however, the taxpayer remits the money as a deposit and there has been no assessment, the IRS may not retain the taxpayer's deposit. *Fisher*, 28 Fed. Cl. at 90-91 (citing *Ewing v. United States*, 914 F.2d 499, 503-04 (4th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991)). The Court of Appeals for the Federal Circuit dealt with the characterization of

a remittance in *Cohen v. United States*, 995 F.2d 205 (Fed. Cir. 1993). The court stated that such a characterization depends on the particular facts and circumstances of each case. *Id.* at 208 (citing *Charles Leich & Co. v. United States*, 329 F.2d 649, 652 (Ct. Cl. 1964)). In examining the facts, the *Cohen* court noted that the taxpayers referred to the remittance as a "partial payment." Further, the court acknowledged that the taxpayers specified what portion of the payment applied to interest and what portion applied to the underlying tax. Moreover, the IRS posted the remittance as an advance payment. For some reason, however, the IRS failed to timely assess liability. In addition, plaintiff consistently indicated its intent to file a claim for a refund. Despite the facts that suggested the remittance was a payment, the court focused on the IRS's failure to timely assess and the taxpayers' constant dispute of tax lability. Therefore, the court concluded that the remittance was a deposit. *Id.* at 209.

The *Cohen* court based its decision in part on *Leich*, 329 F.2d 649. The taxpayer in *Leich* also directed that a part of its remittance apply to the tax and the rest apply to the interest accrued on that tax. Further, on a later tax return, the taxpayer deducted that portion of the remittance applying the interest. Despite these indications that the remittance was a payment, the Court of Claims found that the fact that the taxpayer contested liability throughout the entire process plus the fact that the IRS failed to assess liability were sufficient to find that the remittance was a deposit. *Id.* at 653.

Accordingly, the court will examine the facts and circumstances surrounding plaintiff's remittance of the tax. *Id.* at 652. Important factors include: (1) the taxpayer's intent in remitting the money; (2) how the IRS treated the remittance; (3) when, if at all, defendant assessed the tax lability; and (4) whether the taxpayer contested liability. *Fisher*, 28 Fed. Cl. at 91-92 (citing *Leich*, 329 F.2d at 652, and *Ewing*, 914 F.2d at 503).

Plaintiff's remittance letter is instructive in determining plaintiff's intent. In one page, plaintiff refers to the money as a "payment" seven times.[1] Two of these references instruct defendant to treat these remittances as "partial payments" of tax and interest "pursuant to Section 4.03 of Rev. Proc. 84-58."[2] Section 4.03, ¶ 1 of Rev. Proc. 84-58 requires the taxpayer to specifically designate what portion of the proposed liability the taxpayer intends to satisfy in order to treat the remittance as a partial payment.[3] Plaintiff's remittance letter did in fact specifically designate that $19,374,668 of its remittance applied to the 1984 proposed tax and that $12,538,155 applied to the accrued interest on that tax. In addition, plaintiff deducted the interest portion of its remittance on its 1993 tax return. Taxpayers are entitled to deduct the interest included in payment of their tax liabilities. 26 U.S.C. § 163(a); *Lustig v. United States*, 138 F. Supp. 870 (Ct. Cl. 1956). These facts suggest that plaintiff intended the remittance to be a payment.

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[1] Pl. Mot. at App. at 124.

[2] *Id.*

[3] Def. Resp. at App. A at 27.

As for the IRS's treatment of the remittance, it is undisputed that the IRS posted the remittance as an advanced payment against plaintiff's account. Therefore, defendant's treatment on the remittance is further support for finding a payment.

The two remaining factors, suggest that the remittance was a deposit. First, the IRS failed to timely assess liability. Defendant argues that the IRS relied on plaintiff's remittance letter in believing that the remittance was a payment and that assessment was not mandatory. Defendant acknowledges in its brief, however, that it does not really know why the IRS failed to assess liability for 1984, especially when it managed to assess plaintiff's liability for another year.[4] Thus, since "one can only speculate"[5] why the IRS failed to timely assess, such a failure suggests that the remittance was a deposit. *Cohen*, 995 F.2d at 209.

The second factor suggesting a deposit is plaintiff's protest of tax liability for 1984. On September 11, 1992, plaintiff filed a written protest against the proposed deficiencies.[6] As part of its protest, plaintiff contested the DER issue underlying the tax lability for 1984.[7] The parties then began settlement proceedings, during which plaintiff again contested this issue.[8] Plaintiff's remittance letter, filed on December 17, 1993, reserved the right to prosecute a

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[4] Def. Resp. at 8 n.3 (Fed. Cl. Mar. 21, 1995).

[5] *Id.*

[6] Pl. Mot. at App. at 48.

[7] *Id.* at 49, 80-87.

[8] *Id.* at 114 (containing memorandum dated November 4, 1993, confirming settlement terms).

refund claim based on the DER issue. Thus, plaintiff contested tax liability with the filing of its protest. Additional correspondence sent after the remittance letter also notes plaintiff's intent to contest this issue.[9] Therefore, the fact that plaintiff contested liability before, during, and after filing its remittance suggests that the remittance was a deposit. *Cohen*, 995 F.2d at 209.

Thus, different factors support different conclusions: plaintiff's explicit references to the remittance and its citation of Rev. Proc. 84-58 indicate a payment; defendant's treatment of the remittance also indicates a payment; defendant's failure to assess, coupled with plaintiff's protest, indicate a deposit. Defendent, however, knew that it could not retain a deposit if it did not assess liability within the statutory period. Defendant also knew or should have known of the case law on characterizing a remittance. *See, e.g., Cohen*, 995 F.2d 205; *Leich*, 329 F.2d 649. The facts before the court are analogous to those in *Cohen*. Accord-ingly, the court finds that plaintiff's remittance of $31,912,823 was a deposit.[10]

III. Interest

Plaintiff further argues that once the time allowed for assessment expired, the deposit became an "account stated," thereby allowing plaintiff to recover

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[9] *Id.* at 141, 145.

[10] Defendant cites *Moran v. United States*, 63 F.3d 663 (7th Cir. 1995), as persuasive authority for finding that plaintiff's remittance is a payment. While the facts in *Moran* are similar, case precedent from the Court of Claims and the Court of Appeals for the Federal Circuit suggest that the court find otherwise.

interest accruing since that time. Defendant asserts that recovery based on an account stated theory requires a mutual agreement as to the amount owed. Defendant points out that it has never agreed that it owes plaintiff anything. Plaintiff, in response, contends that defendant had a legal obligation to return the deposit once the limitations period expired. Plaintiff concludes that this legal obligation creates an implied agreement on defendant's part.

Recovery on an "account stated" theory is based on the common law concept that an implied contract arises when a debtor, such as the IRS, submits to a creditor, such as taxpayer, a statement of the final balance due on an account and the creditor agrees to accept the proposed balance to close the account. *West Publishing Co. Employee's Preferred Stock Ass'n v. United States*, 198 Ct. Cl. 668, 675 (1972). To constitute such an account, the government: (1) must have agreed with the taxpayer that he or she has overpaid his taxes in a definite amount; and (2) must have communicated to the taxpayer its intention to repay. *Id.* In *West*, the court found that the government neither expressed nor intimated that it owed the taxpayer any money, let alone the sum taxpayer sought. *Id.* at 676. The court also indicated that the Supreme Court has admonished against expanding the concept of an account stated beyond the established narrow confines. *Id.* at 677 (quoting *Daube v. United States*, 289 U.S. 367, 372-73 (1933)).

Similarly, in this case, there is no evidence that defendant expressly agreed or, through its conduct, implicitly agreed that the taxpayer overpaid. Further there is nothing to indicate that defendant communicated an intention to repay. Rather, defendant has

consistently argued that plaintiff is not entitled to the remittance. It is true that a plaintiff may seek to recover a deposit once the time to assess tax liability has expired. To find, however, that this rule alone creates an implied agreement to pay would unduly expand the concept of an account stated. *Id.* Therefore, the court finds that plaintiff's remittance never became an account stated. Instead, it remained a deposit which does not accrue interest. *Leich*, 329 F.2d at 653.

IV. Subject Matter Jurisdiction

Defendant also argues that the court lacks subject matter jurisdiction, asserting that plaintiff failed to file a refund claim with the IRS before filing suit in this court. The Internal Revenue Code requires taxpayers to first file a refund claim with the IRS when seeking certain funds:

> any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected. . . .

26 U.S.C. § 7422(a) (1988 & Supp. V 1993).

The Court of Claims addressed this language in *Schenley Import Corp. v. United States*, 121 F. Supp. 646 (Ct. Cl. 1953). In that case, the taxpayer, an importer, deposited with the government an amount for estimated future import taxes. The deposit, however, was in excess of the import taxes actually levied. Years later, the taxpayer filed a refund claim with the IRS seeking the remainder of the deposit.

The IRS denied the taxpayer's claim based on 26 U.S.C. § 3313 (1953), which required a claim for refund to be filed within four years after the payment of taxes. Section 3313 used the same language as § 7422 quoted above. The Court of Claims found that this language did not cover deposits. Therefore, the court concluded that it was not necessary for the taxpayer to file a refund claim with the IRS. Rather, it was enough for the taxpayer to file a timely suit with the court. *Id.* at 648.

Similarly, plaintiff seeks the recovery of a remitted deposit rather than a refund of taxes paid. Based on the Court of Claims' interpretation of the language found in § 7422, plaintiff is not required to file a refund claim with the IRS before bringing suit in this court to recover his deposit. *Id.*; *see also Cohen*, 23 Cl. Ct. 717, 725 n.11 (1991), *aff'd*, 995 F.2d 205. Therefore, the court has jurisdiction over this case.

Conclusion

For the reasons discussed above, plaintiff is entitled to recover its $31,912,823 deposit remitted to the IRS. Plaintiff, however, is not entitled to interest on that deposit. Accordingly, plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied. The Clerk is directed to enter judgment in favor of plaintiff in the amount of $31,912,823. No Costs.

/s/ BOHDAN A. FUTEY
BOHDAN A. FUTEY
Judge

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 94-960T

NEW YORK LIFE INSURANCE COMPANY

v.

THE UNITED STATES

[Filed: November 16, 1995]

JUDGMENT

Pursuant to the court's opinion of November 14, 1995, granting plaintiff's motion for summary judgment, and denying defendant's cross-motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff recover of and from the United States the sum of $31,912,823.00. No costs.

David A. Lampen
Clerk of Court

November 16, 1995 By: /s/ Illegible
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 94-960T

NEW YORK LIFE INSURANCE COMPANY

v.

THE UNITED STATES

[Filed: November 21, 1995]

AMENDED JUDGMENT

Pursuant to the court's opinion of November 14, 1995, granting plaintiff's motion for summary judgment, and denying defendant's cross-motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff recover of and from the United States the sum of $31,912,823.00, with no interest to be awarded. No costs.

David A. Lampen
Clerk of Court

November 21, 1995 By: /s/ Illegible
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

APPENDIX C

Revenue Procedure 84-58, 1984-2 C.B. 501, provides:

SECTION 1. PURPOSE

The purpose of this revenue procedure is to update Rev. Proc. 82-51, 1982-2 C.B. 839, which provides procedures for taxpayers to make remittances in order to stop the running of interest on deficiencies.

SEC. 2. BACKGROUND

.01 Section 6213(a) of the Internal Revenue Code provides the general rule that a taxpayer may file a petition with the Tax Court for a redetermination of a deficiency within 90 days after the notice of deficiency is mailed (150 days if the notice is addressed to persons outside the United States). No assessment of a deficiency may be made until after the expiration of the 90-day or 150-day period, or, if petition is filed, until the decision of the Tax Court is final.

.02 Section 6213(b)(4) of the Code provides an exception to the rule in section 6213(a). If an amount is paid as tax, or in respect of a tax, the amount may be assessed as a payment of tax upon receipt of payment. Additionally, if an amount is paid after the mailing of a notice of deficiency, the payment will not deprive the Tax Court of jurisdiction over the matter.

.03 Rev. Proc. 82-51 updated procedures found in Rev. Proc. 64-13, 1964-1 (Part I) C.B. 674, concerning the making of remittances before assessment. Rev. Proc. 82-51 distinguished between payments made in satisfaction of a tax liability and "deposits in the

nature of a cash bond" made merely to stop the running of interest. A deposit in the nature of a cash bond is not a payment of tax, is not subject to a claim for credit or refund, and, if returned to the taxpayer, does not bear interest. Rev. Proc. 82-51 assured taxpayers of their right to petition the Tax Court in cases in which they had made a deposit in the nature of a cash bond before the mailing of the notice of deficiency. It also provided various rules for computing interest, returning deposits, and allocating payments to tax, penalty, and interest.

.04 Section 344 of the Tax Equity and Fiscal Responsibility Act of 1982, 1982-2 C.B. 462, 579, (TEFRA) made several changes affecting computation of interest, effective January 1, 1983.

1 Section 6622 of the Code was enacted to require the daily compounding of all interest required to be paid under the Code.

2 The "no interest on interest" rule formerly found in former section 6601(e)(2) of the Code was repealed.

.05 Under section 4.04 of Rev. Proc. 83-7, 1983-2 C.B. 583, interest continues to run on accrued interest if a deposit in the nature of a cash bond satisfies all or part of the tax but does not satisfy the interest that has accrued up until the date the deposit was made.

SEC. 3. CHANGES/CLARIFICATIONS

.01 Section 4.01 of this revenue procedure permits the making of a deposit in the nature of a cash bond after mailing of the notice of deficiency.

.02 Paragraph 3 of section 4.02 and section 5.01 provide that a deposit in the nature of a cash bond stops the running of interest at the time the remittance is received.

.03 Paragraph 3 of section 4.02 provides that a deposit in the nature of a cash bond will be posted to the taxpayer's account as a payment of tax after the mailing of a notice of deficiency unless the taxpayer specifically asks that it continue to be treated as a deposit. See section 3.01.

.04 Paragraph 4 of section 4.02 allows taxpayers to apply a deposit in the nature of a cash bond against other specific liabilities.

.05 Paragraph 1 of section 4.03 and paragraph 3 of section 4.02 provide that payments will normally be "posted" rather than "assessed". Assessments of payments as tax are made discretionary to the Internal Revenue Service by the Code. Posting payments against tax liabilities ultimately determined to be due assures proper credit and has no adverse effect upon taxpayers with respect to the running of interest.

.06 Paragraph 1 of section 4.03 requires that taxpayers specify what portion of the proposed liability they intend to satisfy if a partial payment is made.

.07 Section 5 revises rules on interest to take account of changes imposed by the TEFRA.

.08 Section 6.02 clarifies the rules for allocating payments to tax, penalty, and interest. Taxpayers will not be allowed to designate payments toward interest unless the underlying tax to which the interest relates is paid or the taxpayer agrees to the assessment.

SEC. 4. PROCEDURE

.01 *Post statutory notice remittances*

1 Subject to the provisions of subparagraph 3, a remittance made after the mailing of a notice of deficiency in complete or partial satisfaction of the deficiency will, absent any instructions from the taxpayer, be considered a payment of tax and will be posted to the taxpayer's account as such as soon as possible. Such a remittance will not deprive the Tax Court of jurisdiction over the deficiency.

2 A remittance made after the mailing of a notice of deficiency but before the expiration of the 90-day or 150-day period, or, if a petition is filed, before the decision of the Tax Court is final, and is specifically designated by the taxpayer in writing as a "deposit in the nature of a cash bond", will be treated as such by the Service. Such a deposit in the nature of a cash bond is not a substitute for a bond to stay assessment and collection described in section 7485 of the Code. Although the amount will be posted to the taxpayer's account, it may be returned to the taxpayer under the conditions in section 4.02 up until the time the Service is entitled to assess the tax.

3 Any remittance made by the taxpayer after the date that the Tax Court files its opinion in an amount greater than the amount of the deficiency determined by the Tax Court, plus any interest that as accrued on that amount at the remittance date, will be treated as a deposit in the nature of a cash bond.

.02 *Deposits in the nature of a cash bond*

1 A remittance made before the mailing of a notice of deficiency that is designated by the taxpayer in writing as a deposit in the nature of a cash bond will be treated as such by the Service. Such a deposit is not subject to a claim for credit or refund as an overpayment. The taxpayer may request the return of all or part of the deposit at any time before the Service is entitled to assess the tax. That amount will be returned to the taxpayer, without interest, unless the Service determines that assessment or collection of the tax determined to be due would be in jeopardy, or that the amount should be applied against any other liability. In such a case, the deposit will not be returned, but will be applied against a jeopardy or termination assessment or against the other liability.

2 Upon completion of an examination, if taxpayer who has made a deposit executes a waiver of restrictions on assessment and collection of the deficiency or otherwise agrees to the full amount of the deficiency, an assessment will be made and any deposit will be applied against the assessed liability as a payment of tax as of the date the assessment was made. In such a case, no notice of deficiency will be mailed and the taxpayer will not have the right to petition the Tax Court for redetermination of the deficiency.

3 Upon completion of an examination, if a taxpayer who has made a deposit does not execute a waiver of restrictions on assessment and collection or otherwise agree to the full amount of the deficiency, the Service will mail a notice of deficiency and the taxpayer will have the right to petition the Tax

Court. That part of the deposit that is not greater than the deficiency proposed plus any interest that has accrued on the deficiency will be posted to the taxpayer's account as a payment of tax at the expiration of the 90 or 150-day period unless the taxpayer rerequests in writing before the date that the deposit continue to be treated as a deposit after the mailing of the notice of deficiency. Any amount of the remittance that exceeds the proposed liability will continue to be considered a deposit and will be returned to the taxpayer without interest subject to the provisions in subparagraph 1 of this section.

4 A taxpayer may elect to have a deposit in the nature of a cash bond that exceeds the amount of tax ultimately determined to be due applied against another assessed or unassessed liability, subject to the provisions of subparagraph 1 of this section. Thus, a taxpayer under examination for several different years may request that a deposit made for one year be applied to another year. Such requests must be in writing and must be directed to the same office with which the original deposit was made.

5 For deposits in the nature of a cash bond made after the mailing of a notice of deficiency, see subparagraph 2 of section 4.01.

.03 *Payments of tax*

1 A remittance not specifically designated as a deposit in the nature of a cash bond will be treated as a payment of tax if it is made in response to a proposed liability, for example, as proposed in a revenue agent's or examiner's report, and remittance in full of the proposed liability is made. A partial remittance will not be treated as a partial payment of tax unless the

taxpayer specifically designates what portion of the proposed liability the taxpayer intends to satisfy. If the remittance is treated as a partial payment of tax, it will be posted to the taxpayer's account as a payment as of the date it is received. That amount may be taken into account by the Service in determining the amount for which a notice of deficiency must be mailed. If the Service is unable to determine whether a partial remittance is intended to be a payment of tax or a deposit in the nature of a cash bond, the Service will treat the remittance as a deposit in the nature of a cash bond and will follow the procedures described in section 4.04.

2 If the remittance equals or exceeds the proposed liability, no notice of deficiency will be mailed. The taxpayer will not have the right to petition the Tax Court for a redetermination of the deficiency.

3 Remittances treated as payments of tax will be posted against the taxpayer's account upon receipt, or as soon as possible thereafter, and may be assessed provided that assessment will not imperil a criminal investigation or prosecution. In any case, the remittance will be applied against the taxpayer's account as of the date received by the Service.

4 If the remittance exceeds the assessed liability including any interest and penalty, the balance will be returned to the taxpayer, without interest, provided the taxpayer has no other outstanding liabilities.

.04 *Undesignated remittances*

1 Any undesignated remittance not described in section 4.03 made before the liability is proposed to the taxpayer in writing (e.g., before the issuance of a

revenue agent's or examiner's report), will be treated by the Service as a deposit in the nature of a cash bond. Such a deposit is not subject to a claim for credit or refund and the excess of the deposit over the liability ultimately determined to be due will not bear interest under section 6611 of the Code. The taxpayer will be notified concerning the status of the remittance, and may elect to have the deposit returned, without interest, at any time before the issuance of a revenue agent's or examiner's report, subject to the provisions of subparagraph 1 of section 4.02.

2 If the taxpayer leaves an undersignated remittance on deposit until completion of the examination, the Service will follow the procedure described in section 4.02.

SEC. 5. INTEREST

.01 The running of interest on an assessed tax liability satisfied by application of a remittance (whether it was treated as a "payment of tax" or a "deposit in the nature of a cash bond") will stop on the date the remittance is received by the Service, regardless of when the liability is assessed or the remittance actually applied against the taxpayer's account. If the remittance is held as a deposit in the nature of a cash bond, but is returned at the taxpayer's request, and a deficiency is later assessed for that period and type of tax, the taxpayer will not receive credit for the period in which the funds were held as a deposit. If a waiver of restrictions on assessment and collection is executed for the amount covered by the remittance, the running of interest will stop on the date of receipt of the remittance, or 30

days after the waiver is filed with the Service, whichever is earlier.

.02 Taxpayers should be cautioned that the making of either a payment of tax or a deposit in the nature of a cash bond will stop the running of interest on only that amount that is actually remitted. Because of the compounding rules in section 6622 of the Code, interest will continue to accrue on accrued interest even though the underlying tax has been paid. Taxpayers wishing to stop the running of interest on both tax and interest should have a remittance for both the tax and the interest that has accrued as of the date of remittance.

.03 If a remittance is treated as a payment of tax and no notice of deficiency is mailed under sections 4.03 or 4.04, any interest due will be assessed with the tax. If a remittance is made after the mailing of a notice of deficiency under section 4.01, or if the Service mails a notice of deficiency under section 4.02, 4.03, or 4.04, any interest due will be assessed after the expiration of the period of time for filing a petition with the Tax Court, or, if a petition is filed, after the Tax Court decision becomes final. Compound interest will continue to accrue on any interest not covered by the remittance under section 4.02. A taxpayer wishing to stop the running of all interest must make a payment or deposit sufficient to cover all accrued interest as of the date of remittance as well as the entire amount of the underlying tax.

.04 No interest will be allowed or paid on a deposit, or any portion of a deposit, returned to a taxpayer before or after assessment.

.05 Remittances treated as payments of tax will be treated as any other assessed amount and compound interest will be paid on any overpayment under section 6611 of the Code. In the event that deposit in the nature of a cash bond is posted to a taxpayer's account as a payment of tax pursuant to subparagraph 3 of section 4.02, interest will run on an overpayment later determined to be due only from the date the amount was posted as a payment of tax.

SEC. 6. ALLOCATION OF REMITTANCES

.01 The Service will allocate any remittance treated as a payment of tax to penalty or interest as designated by the taxpayer if the remittance exceeds the full amount of the underlying tax due. If no designation is made, the remittance will be applied first to tax, then to penalty, and then to interest. If more than one period of tax is involved, the Service will allocate an undesignated remittance so as to satisfy all tax, penalty, and interest for the earliest period before applying any excess to other periods.

.02 If a taxpayer makes a remittance that is treated as a partial payment of tax under section 4.03, the Service will honor the taxpayer's request to allocate all or part of the payment to interest if one of the following conditions is met:

1 The taxpayer agrees to assessment and collection of the liability by executing a waiver of restrictions; or

2 The taxpayer pays the underlying tax with respect to the amount to be designated as interest and the amount designated as interest does not exceed the

amount of interest that has accrued on the tax being paid.

.03 Any remittance purporting to be a partial payment of tax that does not meet one of the conditions in section 6.02 will be treated in its entirety as a deposit in the nature of a cash bond and the procedures in section 4.02 will be followed. In such a case, the taxpayer may cure any defects in the designation by redesignating the amount to be allocated as interest.

.04 Taxpayers may not make designations of remittances treated as deposits in the nature of a cash bond. If a liability is ultimately assessed and the deposit applied as a payment of tax, the Service will allocate the payments in accordance with any designation then made by the taxpayer. If no allocation is designated by the taxpayer, the remittance will be applied first to tax, then to penalties, and then to interest.

SEC. 7. EFFECTIVE DATE

This Revenue Procedure is effective for all remittances made on or after October 1, 1984.

SEC. 8. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 82-51 is superseded, effective with respect to remittances made on or after October 1, 1984.

Supreme Court, U.S.
FILED
MAR 27 1998
CLERK

No. 97-1229

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED STATES OF AMERICA,
Petitioner,
v.
NEW YORK LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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34 pp

QUESTIONS PRESENTED

1. Whether the Court of Federal Claims, applying a facts and circumstances approach, properly held that a taxpayer remittance relating to disputed taxes that the Internal Revenue Service failed to assess constituted a "deposit" rather than a "payment" of such taxes.

2. Whether the Court of Federal Claims properly exercised its jurisdiction under the Tucker Act, 28 U.S.C.A. § 1491(a)(1) (1994 & Supp. 1997), to order the return of a deposit of taxes improperly retained by the Internal Revenue Service.

LIST OF PARTIES, PARENT COMPANIES, AND SUBSIDIARIES

The names of all parties appear in the case caption. Respondent New York Life Insurance Company has no parent company, and only one of its subsidiaries, Express Scripts, Inc., has issued shares to the public.

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IN THE

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OCTOBER TERM, 1997

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UNITED STATES OF AMERICA,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

The opinions below and the basis for this Court's jurisdiction are adequately set forth in the Petition (Pet. at 1-2).

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Petition (Pet. at 2-3).

COUNTER STATEMENT OF THE CASE

This case involves the consequences of a simple mistake made by the Internal Revenue Service ("IRS") when it failed to assess a proposed tax deficiency, as it was required by law to do, within the statute of limitations.

Following an audit of Respondent New York Life Insurance Company ("New York Life"), the IRS proposed an increase in tax liability for each of the years 1984, 1986, and 1987. New York Life contested the proposed additional taxes and, anticipating litigation to resolve the dispute, remitted three checks to the IRS, with instructions to treat the remittances as payments of contested taxes for 1984, 1986, and 1987. The IRS timely assessed the contested taxes for 1986 and 1987, but, for reasons the government admits it cannot explain, failed to assess the disputed 1984 taxes prior to the expiration of the statute of limitations on assessment. (Indeed, to this date, the contested 1984 taxes have never been assessed.)

When it realized that the contested 1984 taxes had not been assessed and that the statute of limitations on assessment had run, New York Life initiated this proceeding against the United States in the Court of Federal Claims under the Tucker Act, 28 U.S.C.A. § 1491(a)(1) (1994 & Supp. 1997), to recover its remittance. The trial court, relying on well-established circuit precedent, examined the facts and circumstances surrounding New York Life's remittance. Finding that such facts were indistinguishable from those in *Cohen v. United States*, 995 F.2d 205 (Fed. Cir. 1993), the trial court held that the remittance constituted a "deposit" and not a "payment" of taxes.[1] (Pet. App. at 32a-34a.) The trial court further held that because the remittance was a deposit rather than a payment, the court possessed jurisdiction to hear the case under the Tucker Act, and New York Life was not required to file a refund claim as a precondition to its lawsuit. (Pet. App. at 36a-37a.) The trial court found it so clear that New York

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[1] The court of appeals agreed that *Cohen* was controlling, noting in its opinion (Pet. App. at 15a) that:

> [T]his is a stronger case than *Cohen* for treating the transmittal as a deposit, since there the Service made an untimely assessment, whereas here it made no assessment at all.

Life was entitled to the immediate return of its deposit that it dispensed with oral argument and directed that its opinion not be published because it lacked precedential value. (Pet. App. at 37a.)

On appeal, in an opinion written by Judge Friedman, the court of appeals affirmed the trial court on both issues. Judge Rader dissented on the jurisdictional issue (Pet. App. at 17a-24a), relying on *United States v. Mitchell*, 445 U.S. 535 (1980), apparently unaware that the case had been overruled by this Court in *United States v. Mitchell*, 463 U.S. 206 (1983).

* * * *

Pursuant to Rule 15.2 of the Rules of this Court, New York Life corrects and supplements the government's Statement of the case as follows:

1. The government omits certain facts that show that the failure to assess taxes was caused by a simple IRS mistake, which easily could have been avoided.

In August 1992, the IRS proposed adjustments to New York Life's income tax liability for the years 1984, 1986, and 1987.[2] One of the contested issues was the proposed disallowance of a deduction for a negative recomputed differential earnings rate ("DER") under section 809 of the Internal Revenue Code (the "Code") for 1987, and the resulting disallowance of a net operating loss carryback from 1987 to 1984. In November 1993, New York Life and the IRS reached a tentative resolution for both 1984 and 1987 (as well as for 1986) under which the negative DER issue (among others) would remain contested, and New York Life would pay a proposed deficiency but retain the right to prosecute a refund claim. Based on this tentative resolution, in December 1993, New York Life remitted three checks to the IRS—one

[2] Although New York Life's 1985 and 1988 tax years were also affected by adjustments proposed by the IRS, the IRS did not assert a tax deficiency for either of those years, and those years are not relevant to the disposition of this case.

for $31,912,823 with respect to its 1984 tax year, one for $1,682,910 with respect to 1986, and one for $887,187 with respect to 1987. The three checks were transmitted with and described in a single letter to the IRS dated December 17, 1993.[3] (Pet. App. at 2a-3a, 28a-29a.)

In March 1994, New York Life submitted to the IRS an executed Form 870-AD offering to waive the restrictions on assessment with respect to the anticipated tax deficiencies for the years 1984, 1986, and 1987. On the form, New York Life continued to expressly reserve the right to file a claim for refund with respect to the contested liabilities for all three years. The IRS did not accept that proffered form, but instead requested that a new form be submitted containing only the tax years 1986 and 1987. New York Life complied with this request. Subsequently, in May 1994, the IRS executed the revised form submitted by New York Life, covering only 1986 and 1987. (Pet. App. at 3a.)

The IRS timely assessed deficiencies for the 1986 and 1987 tax years (*i.e.*, the years listed on the revised form) but failed to assess a deficiency for the 1984 tax

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[3] In its Petition (Pet. at 4-5), the government mischaracterizes the facts surounding the tentative resolution for 1984, 1986, and 1987. First, the government repeatedly refers (*see* Pet. at 4) to the tentative resolution as a "settlement" of New York Life's tax liability. Although New York Life referred to a "tentative settlement" in the December 17, 1993, letter that accompanied its remittances, there was, in fact, no "settlement" of the tax liability asserted with respect to the negative DER issue. More accurately, the parties reached an "agreement to disagree" regarding this contested issue.

Second, the government asserts (Pet. at 5) that New York Life "does *not* contend that the tax was not owed at the time that it was paid . . ." (emphasis in original). This statement is incorrect; New York Life has never agreed that it owes the tax it remitted with reference to the negative DER issue, and it has at all times disputed the tax liability proposed by the IRS with regard to this issue. The trial court specifically found, on the basis of the undisputed facts, that New York Life "contested liability before, during, and after filing its remittance." (Pet. App. at 33a-34a.)

year. (Pet. App. at 3a-4a, 33a.) In its Petition, the government states (Pet. at 5) that "[h]aving received full payment [for 1984] . . . the [IRS] made no assessment of those taxes," thus implying that the IRS's failure to assess tax for 1984 was linked to the receipt of New York Life's remittance for that year. The receipt of that remittance, however, cannot explain the failure to assess tax, particularly in view of the fact that the IRS also received remittances for 1986 and 1987 that were enclosed with the same transmittal letter, and the IRS did assess taxes for those years.[4] If the IRS had accepted the first form proffered by New York Life, it presumably would have assessed the taxes for 1984, as it did for 1986 and 1987. Moreover, as discussed below (*see infra* note 14), the IRS had other statutory authority to assess the 1984 taxes. The government has never explained why the IRS did not assess the taxes—either by accepting the first form proffered by New York Life or by using any of its other options to assess the taxes.

2. Plainly, New York Life's letter instructed the IRS to treat the $31,912,823 remittance as a payment under Rev. Proc. 84-58, § 4.03, 1984-2 C.B. 501, 502. The government seems to interpret (Pet. at 4-5) New York Life's reference to Rev. Proc. 84-58 as waiving the requirement that the IRS assess tax for 1984. That revenue procedure, however, prescribes a rule that the IRS flatly

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[4] The trial court rebuffed the government's attempt to blame the taxpayer for the IRS's failure to assess tax for 1984. Rejecting the government's argument that the IRS failed to assess tax because it was misled by New York Life's correspondence, the trial court stated (Pet. App. at 33a):

> Defendant acknowledges in its brief, however, that it does not really know why the IRS failed to assess liability for 1984, especially when it managed to assess plaintiff's liability for another year. Thus, since [government trial counsel has stated that] "one can only speculate" why the IRS failed to timely assess, such failure suggests that the remittance was a deposit. *Cohen*, 995 F.2d at 209. (Footnote references omitted.)

disregarded in this case and that the government has failed to discuss or even cite in its Petition. Section 4.03(4) of Rev. Proc. 84-58 states that:

> If the remittance exceeds the *assessed liability* . . . the balance *will be returned* to the taxpayer, without interest [*i.e.*, will be treated as a deposit], provided the taxpayer has no other outstanding liabilities.

Rev. Proc. 84-58, § 4.03(4), 1984-2 C.B. at 503 (emphasis added).

The government relies on another section of Rev. Proc. 84-58, section 4.03(1), in arguing (Pet. at 4-5) that New York Life's instruction to treat the remittance as a payment was conclusive. Section 4.03(1) provides in relevant part:

> If the Service is unable to determine whether a partial remittance is intended to be a payment of tax or a deposit in the nature of a cash bond, the Service will treat the remittance as a deposit in the nature of a cash bond . . . .[5]

This section, at most, purports to create a default mechanism that favors deposit treatment when the taxpayer's intention is not clear. Most important, section 4.03(1) does not address the specific situation presented here, while section 4.03(4) clearly does. The government ignores section 4.03(4), which provides the applicable rule in situations where the tax is never assessed and makes it

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[5] Rev. Proc. 84-58, § 4.03(1), 1984-2 C.B. at 503. In its Petition, the government reconstructs the language of section 4.03(1) and inserts the word "only," even though it does not appear in the revenue procedure, thereby changing the plain meaning of section 4.03(1). The government reorders the language (Pet. at 4) to provide that "a remittance will be treated 'as a deposit in the nature of a cash bond' only '[i]f the Service is unable to determine whether a partial remittance is intended to be a payment of a tax or a deposit.'" As so reconstructed, section 4.03(1) cannot be squared with section 4.03(4), which is quoted above in the text but nowhere mentioned in the Petition.

clear that a taxpayer's designation of a remittance of contested taxes as either a payment or deposit will not effect a waiver of the assessment requirement if assessment is otherwise required.

3. The government mischaracterizes the nature of the suit brought by New York Life in the Court of Federal Claims when it states that New York Life "elected" not to proceed with a claim for refund, but instead "elected" to proceed on a recovery-of-deposit theory. (Pet. at 5-6.)

Contrary to the government's Petition, taxpayers are not provided a choice in remedy under the internal revenue laws. A claim for refund may be filed under 28 U.S.C.A. § 1346(a)(1) (1994) and Code § 7422(a) only if the taxpayer has *overpaid* a tax. *Lewis v. Reynolds*, 284 U.S. 281, *modified*, 284 U.S. 599 (1932). As made clear in Judge Friedman's opinion for the court of appeals (Pet. App. at 10a-13a), the existence of a "payment" is a prerequisite to tax refund litigation.

Because New York Life did not make a "payment" of tax, it did not overpay its tax, and it cannot recover its remittance in a tax refund suit, which presupposes a tax overpayment. New York Life accordingly is pursuing the only remedy that is available to it, *i.e.*, an action for the return of a deposit that has been improperly retained by the IRS. As discussed below (*see infra* pp. 20 *et seq.*), such an action is properly maintained under the Tucker Act.

4. The government erroneously attributes an ulterior motive to New York Life in filing this deposit recovery action as opposed to a refund suit. The government asserts (Pet. at 5) that New York Life elected not to file a claim for refund, because its "position on the merits of the [underlying] tax issue was quite weak."

In support of this assertion, the government cites to decisions adverse to taxpayers on the negative DER issue

that were rendered only *after* this deposit recovery action was filed. At the time this action was brought, the only decided case on the negative DER issue was one in which the taxpayer had prevailed. Thus, exactly opposite to the government's implication, New York Life initiated this deposit action, as it was required by law to do, at a time when the only decisional authority on the negative DER issue was favorable.[6]

Also misleading is the government's statement (Pet. at 3) that in claiming a deduction for a negative DER on its 1987 income tax return, New York Life "employed a methodology that had been rejected by the Commissioner." While this statement suggests that New York Life was flouting a well-settled position of the IRS, until the day before New York Life filed its tax return for 1987, the announced position of the IRS was that a negative DER could be used. Announcement 88-47, 1988-12 I.R.B. 56 (Mar. 21, 1988). In Notice 88-106, 1988-2 C.B. 444 (Sept. 13, 1988), the IRS reversed course, without explaining its rationale for doing so, and stated that the DER could not be negative. A controversy between mutual life insurers and the IRS ensued, and that controversy remains the subject of on-going tax litigation. *See CUNA Mut. Life Ins. Co. v. United States*, 97-2 U.S.T.C. ¶ 50,904 (Fed. Cl. 1997), *appeal pending*, No. 98-5033 (Fed. Cir.); *American Mut. Life Ins. Co. v. United*

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[6] New York Life filed the present suit in October 1994. At that time, the only precedent on the negative DER issue was *American Mut. Life Ins. Co. v. United States*, 93-2 U.S.T.C. (CCH) ¶ 50,652 (S.D. Iowa 1993), a case that had been decided for the taxpayer and was then pending on the government's appeal. While the Eighth Circuit ultimately reversed the district court (43 F.3d 1172 (8th Cir. 1994), *cert. denied*, 516 U.S. 930 (1995)), it did not do so until December 1994, two months *after* the instant suit had been filed.

The other case cited by the government as upholding its position on the negative DER issue was not even filed, let alone decided, at the time New York Life filed suit in this case. *Indianapolis Life Ins. Co. v. United States*, 940 F. Supp. 1370 (D. Ind. 1996), *aff'd*, 115 F.3d 430 (7th Cir. 1997).

States, No. 96-174 T (Fed. Cl. complaint filed Apr. 2, 1996); *American Mut. Life Ins. Co. v. United States*, No. 96-170 T (Fed. Cl. complaint filed Mar. 28, 1996).[7]

5. The government's truncated account of the trial court's deliberations obscures the fact that, in resolving the payment-or-deposit issue, the trial court did apply what the courts have called the "facts and circumstances" approach.[8] The trial court, citing the Federal Circuit's leading case on the issue, *Cohen*, 995 F.2d 205, specifically held that the characterization of a remittance "depends on the particular facts and circumstances of each case." (Pet. App. at 31a.) And, the trial court did weigh the relevant facts, including the following: (i) New York Life's description of its remittance as a "payment," (ii) the IRS's treatment of the remittance as a payment, (iii) New York Life's contest of the underlying tax liability, and (iv) the IRS's failure to timely assess the tax liability.

The government places great emphasis (Pet. at 7, 9) on the statement by the courts below that the remittance was a deposit "as a matter of law." This statement does not imply a rejection of the facts-and-circumstances approach. Rather, it reflects the posture of the case when it was presented to the trial court for decision.

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[7] In any event, taxpayers are generally free to take positions on their tax returns that are contrary to the position of the IRS. In this case, as it happened, New York Life's claimed deduction was in accord with the position of the IRS as originally announced.

[8] Elsewhere in its Petition (Pet. at 16), in a similar vein, the government describes the Federal Circuit as rejecting a "facts and circumstances" approach in favor of the Fifth Circuit's "per se" rule. In fact, just the opposite is true. In *Cohen*, the Federal Circuit expressly rejected the Fifth Circuit's per se rule. 995 F.2d at 209. Indeed, in its brief submitted to the Fifth Circuit in *Harden v. United States*, 74 F.3d 1237 (5th Cir. 1995), the government urged that court to reject the per se rule in favor of a facts-and-circumstances approach, citing *Cohen* as one of the facts-and-circumstances cases that it—the government—favored. *See*, Brief for the Appellee at 18-19, *Harden v. United States* (No. 95-40046).

This case (like the *Cohen* case before it) was decided on cross motions for summary judgment. The trial court noted (Pet. App. at 29a) that:

> Summary judgment is appropriate when the pleadings raise no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law.

The court then evaluated the undisputed facts and, finding that the facts were substantially identical to those presented in *Cohen*, held that New York Life was entitled to summary judgment "as a matter of law" on the basis of that precedent.

ARGUMENT

I. THE COURT OF APPEALS' DECISION THAT THE REMITTANCE WAS A DEPOSIT DOES NOT COME WITHIN THIS COURT'S STANDARDS FOR REVIEW ON WRIT OF CERTIORARI

A. The Decision Below Presents No Conflict With Decisions of Other Courts of Appeals and Properly Applies this Court's Decision in the *Rosenman* Case.

1. This Court first considered the characterization of taxpayer remittances over 50 years ago in *Rosenman v. United States*, 323 U.S. 658 (1945). In that case, the taxpayer remitted $120,000 prior to both assessment and the issuance of a notice of deficiency. Accompanying the remittance was a letter stating that "[t]his payment is made under protest and duress." *Id.* at 660. Reasoning that "the taxpayer did not discharge what he deemed [to be] a liability nor pay one that was asserted," this Court concluded, in a unanimous decision, that, prior to assessment, the remittance was a deposit and not a payment. *Id.* at 662.

Some courts construe *Rosenman* as prescribing a per se rule under which a remittance is always treated as a deposit in the absence of assessment. *See Ford v. United*

States, 618 F.2d 357 (5th Cir. 1980); *Thomas v. Mercantile Nat'l Bank*, 204 F.2d 943 (5th Cir. 1953).[9]

The prevailing view, however, in the Federal Circuit and elsewhere, applies *Rosenman* as supporting what the courts have characterized as a facts-and-circumstances approach. In cases (like this one) where the tax is contested, the courts applying this approach uniformly treat the remittance as a deposit in the absence of assessment, which was precisely the situation involved in *Rosenman*. *See Cohen*, 995 F.2d 205; *Fortugno v. Commissioner*, 353 F.2d 429 (3d Cir. 1965), *cert. dismissed*, 385 U.S. 954 (1966); *Lewyt Corp. v. Commissioner*, 215 F.2d 518 (2d Cir. 1954), *aff'd in part and rev'd in part on other grounds*, 349 U.S. 237 (1955); *Charles Leich & Co. v. United States*, 329 F.2d 649 (Ct. Cl. 1964). On the other hand, where the taxpayer does not contest the asserted tax, but rather admits or agrees with it, a remittance is treated as a payment despite the absence of timely assessment. *See Ewing v. United States*, 914 F.2d 499 (4th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991); *Ameel v. United States*, 426 F.2d 1270 (6th Cir. 1970); *Fisher v. United States*, 28 Fed. Cl. 88, 92 (1993); *Northern Natural Gas Co. v. United States*, 354 F.2d 310 (Ct. Cl. 1965).

Although the courts have applied two tests, as will be demonstrated below (*see supra* pp. 13-15), the results in the payment-or-deposit cases have been remarkably consistent. Most important for present purposes, the instant case is not an appropriate vehicle for this Court to resolve the question of which test should be applied, because New York Life is entitled to prevail under both of these tests. Under the per se rule, New York Life would prevail, because the tax, whether or not contested, was not

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[9] The Eighth Circuit also may apply this per se rule. *Compare United States v. Dubuque Packing Co.*, 233 F.2d 453 (8th Cir. 1956), *with Essex v. Vinal*, 499 F.2d 226 (8th Cir. 1974), *cert. denied*, 419 U.S. 1107 (1975).

assessed; under the facts-and-circumstances approach, New York Life would prevail, because (as the court below held) the unassessed tax was contested at all relevant times.

There is, however, a narrow circumstance where the two tests have produced conflicting results. That circumstance involves a remittance that accompanies a request for an automatic extension of time to file an annual tax return. *Compare Harden v. United States*, 74 F.3d 1237 (5th Cir. 1995) (deposit), *with Gabelman v. Commissioner*, 86 F.3d 609 (6th Cir. 1996) (payment), *and Weigand v. United States*, 760 F.2d 1072 (10th Cir. 1985) (payment). That, of course, is not this case, which involves a contested tax liability, and the government itself has recognized that that narrow conflict does not implicate cases such as this one.

In this regard, in its Suggestion for Rehearing En Banc before the Fifth Circuit in *Harden*, the government acknowledged that the facts-and-circumstances test cases (including *Moran v. United States*, 63 F.3d 663 (7th Cir. 1995); *Cohen*, 995 F.2d 205; *Ewing*, 914 F.2d 499; and *Fortugno*, 353 F.2d 429) represent a "line of authority [that] has no real bearing" on the characterization of remittances accompanying a request for extension of time, because such amounts are defined by statute as payments. *See* Appellant's Suggestion for Rehearing En Banc at 8-9, *Harden v. United States* (No. 95-40046). Thus, while the Fifth Circuit's decision in *Harden* created a narrow conflict, there is no need for this Court to resolve that conflict here.[10]

The government also maintains (Pet. at 15) that the holding of the court below would create doubt regarding

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[10] The government's Suggestion for Rehearing En Banc was denied by the Fifth Circuit, and the government did not seek further review. Neither the decision in *Harden* nor the conflict it created is mentioned in the government's Petition.

the treatment of "routine tax payments," *e.g.*, withholding and estimated taxes and taxes remitted with annual tax returns. This is not so. These routine remittances are treated as payments by reason of specific statutory provisions directing such treatment. *See* Code §§ 6151(a), 6513; *see also Ehle v. United States*, 720 F.2d 1096 (9th Cir. 1983); *Plankinton v. United States*, 267 F.2d 278 (7th Cir. 1959). The present case does not involve a routine tax payment, and the decision of the court below thus does not threaten or in any way affect the treatment of such a payment.

2. The government's Petition (Pet. at 16) makes a fundamental and perplexing mistake by treating the Federal Circuit as following the Fifth Circuit's per se rule.[11] In *Cohen*, however, the Federal Circuit expressly rejected a per se rule, holding that "[t]he trial court here correctly rejected recognition of a per se rule and based its decision on the rationale of *Rosenman* and *Charles Leich & Co.*" *Cohen*, 995 F.2d at 209. Citing *Cohen* as controlling precedent, the courts below in this case applied a facts-and-circumstances approach and not the Fifth Circuit's per se rule.

3. In addition, contrary to the government's contention (Pet. at 17), the results in the three cases relied upon by the government are entirely consistent with the court of appeals' holding in this case. Therefore, these cases do not present a circuit conflict that necessitates this Court's review.

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[11] The government's confusion concerning this point is further evidenced by its erroneous statement (Pet. at 17) that the Federal Circuit has taken the position—in accord with the per se rule—that "there can be no payment of tax before the IRS makes a formal assessment of the . . . tax liability." The quoted passage, which the government states is the Federal Circuit's position, is actually the Ninth Circuit's summary of the position taken *by the taxpayer* in *Zeier v. United States*, 80 F.3d 1360, 1364 (9th Cir. 1996), which the Ninth Circuit ultimately rejected.

In *Zeier v. United States*, 80 F.3d 1360 (9th Cir. 1996), the taxpayer remitted an amount with an estate tax return at the time the return was due. Such remittances are statutorily treated as payments. Code § 6151(a). Thus, *Zeier* presents no conflict.

In *Ewing*, 914 F.2d 499, the taxpayers entered into a closing agreement with the IRS pursuant to Code section 7121 and remitted the amount of uncontested tax agreed upon in the closing agreement. Such amounts were not timely assessed. Consistent with *Rosenman* and the authority applying the facts-and-circumstances rule, the court held that the remittance of an amount in payment of an agreed-upon tax liability constitutes a payment rather than a deposit. Because New York Life contested its tax liability, the present case is distinguishable from, and clearly is not in conflict with, *Ewing*.

In *Fisher v. United States*, 28 Fed. Cl. at 92, the Court of Federal Claims considered as critical the fact that the taxpayer had not contested the tax "at all relevant times" and concluded that the failure to contest the tax at all times justified payment treatment even in the absence of assessment. With this standard in mind, the result in *Moran v. United States*, 63 F.3d 663, relied upon by the government (Pet. at 16-17), is likewise not in conflict with the present case.

In *Moran*, the taxpayer initially contested the tax but later agreed that additional tax was due in connection with a collateral Tax Court proceeding. The Seventh Circuit held that the remittances in issue were payments rather than deposits.[12] Unlike the situations present in

[12] Although the Seventh Circuit in *Moran* was critical of the Federal Circuit's decision in *Cohen*, as explained in the text, the Seventh Circuit reached the same result the Federal Circuit would have reached if it had decided *Moran*. Moreover, the precedential value of *Moran* is undermined by the fact that the district court lacked jurisdiction over that case irrespective of whether the taxpayer's remittances were properly characterized as payments or as

Fisher and *Moran*, the undisputed fact in the present case is that New York Life contested the underlying taxes " 'at all relevant times.' " *Fisher*, 28 Fed. Cl. at 92 (citation omitted).[13]

4. Finally, the government incorrectly characterizes the holding of this Court in *Rosenman* in an apparent attempt to create a conflict between the present case and *Rosenman*. The government argues that the "evident rationale" of *Rosenman* is that the taxpayer and the government have agreed to a "deposit arrangement." (Pet. at 12-13.)

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deposits. In *Moran*, the district court held that the taxpayer's suit was not for the refund of a tax overpayment, but rather was for the return of a deposit. If, however, the taxpayer's remittances constituted deposits (as found by the district court), the district court was without jurisdiction over the taxpayer's claim, because it exceeded $10,000. Such a claim is cognizable only in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C.A. § 1491(a)(1). *See* 28 U.S.C.A. § 1346(a)(2) (1993 & Supp. 1998). On the other hand, if the taxpayer's remittances constituted payments (as the Seventh Circuit held), the district court nevertheless lacked jurisdiction, because the taxpayer failed to file a timely claim for refund. Code § 7422(a). There was thus no need for either court in *Moran* to resolve the payment-or-deposit question. Although the government raised the jurisdictional defect under Code section 7422(a) in the Seventh Circuit, it failed to raise the obvious jurisdictional issue under 28 U.S.C. § 1346(a)(2) in either the district court or the Seventh Circuit.

[13] Citing *Moran*, 63 F.3d 663, *Cohen*, 995 F.2d 205, *Ewing*, 914 F.2d 499, and *Fortugno*, 353 F.2d 429 (among other cases), the government's Suggestion for Rehearing En Banc in *Harden* acknowledges the consistency in the circuit court decisions, including those of the Federal Circuit, when it states:

> Indeed, in situations not involving a statutorily defined payment, the other circuit courts are virtually unanimous in concluding that the nature of the remittance depends on the taxpayer's "intent" in making the remittance.

Appellant's Suggestion for Rehearing En Banc at 8-9, *Harden v. United States* (No. 95-40046). Two of these cases (*Cohen* and *Fortugno*) reached the same result as the court below did in this case (*i.e.*, the remittance of an unassessed and contested tax was treated as a deposit) employing a facts-and-circumstances approach.

No court has adopted this supposedly "evident" interpretation of *Rosenman*. *Rosenman*, itself, would seem to be at odds with this theory, because the Court ruled the remittance in that case to be a deposit despite the government's opposition to that characterization. Simply put, the government seeks to set aside a half-century of case precedent and replace that precedent with an entirely new theory—a "consensual deposit" theory. This new test would take away from the Federal courts and give to the IRS the sole power to determine whether a remittance will be treated as a payment or deposit, by either agreeing or not agreeing to treat it as a deposit.

B. The Case Law and the Code Provide a Well-Defined Regime for the Administration of the Tax Laws Relating to Assessments.

1. The government makes a variety of claims concerning the difficulties it would encounter if the decision below is permitted to stand. For example, the government asserts (Pet. at 11, 19) that "[r]eview by this Court is warranted to avoid continuing uncertainty and disparate application of the revenue laws," and (Pet. at 19) that this case raises "fundamental issues of tax administration."

The first claim lacks merit, because, as we have already shown, the circuit court decisions in cases involving contested taxes uniformly treat a remittance as a deposit in the absence of assessment. The second claim founders, because the problem in this case is a problem of the IRS's own making, and is one that the IRS can easily cure. Judge Friedman put it best in his opinion for the court below. The IRS, he stated, "can avoid this situation by making a timely assessment of the tax deficiency, which would assure it the right to litigate the merits of the deficiency."[14] (Pet. App. at 16a.) The government should

[14] The IRS had multiple opportunities to assess the 1984 tax here in controversy. First, the IRS had immediate assessment authority under Code section 6213(b)(4), which applies in a case

not be asking this Court to spend its precious time on an issue that the IRS, on its own, is fully capable of resolving. As we have shown, this case is about a missed statute of limitations—nothing more—and there is no need for this Court to review it.

2. In an attempt to excuse the IRS's failure to avail itself of the multiple opportunities it had to assess tax, the government downplays (Pet. at 17) the significance of assessment in the tax system.

An assessment of tax is the formal recording of a taxpayer's tax liability. Code § 6203. Relying on this definition (Pet. at 17), the government contends that the act of assessment is important only in cases where it must collect tax by force. In other cases, according to the government, the act of assessment is nothing more than an internal bookkeeping entry.

This view of assessment is incorrect. Code section 6201(a) provides that the Secretary of the Treasury is "required" to make an assessment of all taxes imposed under the Code. *See also* Code §§ 6501(a) (providing that the tax "shall" be assessed within three years) & § 6322 (providing that assessment gives rise to liability, which, in turn, creates a lien in favor of the IRS).

Moreover, the mere existence of Code section 6213(b)(4) is devastating to the government's position that attributes significance to the act of assessment only in cases where the IRS seeks to compel the payment of taxes.

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like this one where the taxpayer proffers an advance remittance. Second, the IRS also had immediate assessment authority under Code section 6213(b)(3), because the contested 1984 tax related to a "carryback" adjustment from 1987. Third, the IRS had authority to issue a notice of deficiency and assess this tax pursuant to Code section 6213(a). Fourth, because New York Life submitted to the IRS an executed form offering to waive the restrictions on assessment, which included the anticipated tax deficiency for 1984, Code section 6213(d) would have permitted the IRS to immediately assess without first issuing a notice of deficiency.

Code section 6213(b)(4) proves otherwise, because it grants streamlined assessment power to the IRS, permitting the immediate assessment of a *voluntary* remittance of tax, like the one at issue here. Congress obviously has a different view of the importance of assessment than is found in the government's Petition. The government's position in this case would read section 6213(b)(4) out of the Code.

The government's effort to downplay assessment conflicts with the IRS's own recognition of the importance of assessment. In 1954, Congress amended the Code to grant the Secretary special assessment authority to assess a tax upon receipt of a remittance without first issuing a notice of deficiency. *See* Code § 6213(b)(4). *This is the precise situation in this case.* The IRS relied on this provision as its authority when it first set forth rules regarding advance payments in Rev. Proc. 64-13, 1964-1 C.B. 674, *modified,* Rev. Proc. 82-51, 1982-2 C.B. 839, *superseded,* Rev. Proc. 84-58, 1984-2 C.B. 501. Section 3.03 of Rev. Proc. 64-13 acknowledged the importance of assessment and expressly provided that:

> An advance payment received before the mailing of a notice of deficiency *which is not assessed will be treated as a deposit* . . . .

Id. (emphasis added).

Even the IRS's current internal procedures emphasize the importance of assessment, stating that in the case of advance payments, "additional steps *must be taken* to have the tax assessed" and instructing agents to "assess the liability promptly." I.R.M. § 8273(2) (emphasis added).

3. The government's new "consensual deposit" theory (*see* Pet. at 12-15) is at odds with well-settled legal standards and would otherwise create an unfair and unworkable standing. Such a theory would replace the settled case law and give the IRS the sole power to deter-

mine whether a remittance will be treated as a payment or deposit by either agreeing or not agreeing to treat it as a deposit. This Court long ago presciently ruled out such an approach, explaining that "[i]t will not do to treat the same transaction as payment and not as payment, whichever favors the Government." *Rosenman*, 323 U.S. at 663. Rev. Proc. 84-58 contains a number of ambiguities with respect to the importance of assessment (*compare* § 4.03(1) *with* § 4.03(4)), and IRS "guidance" in this area has been anything but consistent over the years. *See* Rev. Rul. 89-6, 1989-1 C.B. 119 (noting that the IRS had changed its administrative position in Rev. Proc. 84-58). It is thus evident that relying on shifting IRS standards and parsing phrases in taxpayer correspondence will not ensure greater predictability and certainty on the payment-or-deposit issue as claimed by the government.

4. Finally, contrary to the government's contention, the result in this case reinforces and strengthens our system of taxation. This controversy exists only because the IRS made a simple mistake—it failed to assess a disputed tax within the statute of limitations on assessment. When mistakes of this nature are made by taxpayers, the result, while sometimes harsh and unfortunate, is clear. Taxpayers forfeit their rights when the statute of limitations expires, and such forfeitures are imposed even in the face of compelling equitable circumstances and personal hardship, as this Court confirmed recently in the equitable tolling case, *United States v. Brockamp*, 117 S. Ct. 849 (1997). Evenhanded administration of the tax laws requires that the IRS likewise must suffer the consequences of a failure to act within the limitations period.

C. The Decision Below That the Remittance Constitutes a Deposit is Clearly Correct.

Finding that the "significant operational facts in the present case . . . are indistinguishable from those in *Cohen*" (Pet. App. at 14a), the court of appeals held

that its decision in *Cohen* was controlling. In *Cohen*, the Federal Circuit based its decision on the rationale of *Rosenman* and reached a result consistent therewith.

In the present case, the courts below properly analyzed all of the relevant facts. Relying on *Rosenman* and other well-established precedent, the courts below concluded that New York Life's remittance did not discharge an agreed-upon tax liability. The government has failed to explain why this Court should depart from this well-settled precedent. Accordingly, in the absence of assessment, the remittance was properly held to be a deposit.

II. THERE IS NO REASON FOR THIS COURT TO REVIEW THE TRIAL COURT'S EXERCISE OF JURISDICTION UNDER THE TUCKER ACT

A. The Efficient Administration of the Tax Laws Is In No Way Imperiled by the Jurisdictional Decision of the Court of Appeals.

The government asserts (Pet. at 26-27) that Judge Friedman's decision on the jurisdictional issue will create chaos in the administration of the tax laws; that the decision may give taxpayers the option to proceed by way of a refund suit or a Tucker Act claim; and that neither taxpayers nor the government will know with certainty in which forum tax litigation should be commenced. These assertions are utterly without substance.

As we have previously shown (*see supra* p. 7), taxpayers have no choice regarding where and how tax controversies exemplified by this case will be determined. In the typical case where a remittance constitutes a "payment" of tax, a taxpayer will be required to follow the tax refund procedures specified in Code section 7422(a). In the rare case where a remittance constitutes a "deposit," a taxpayer will be unable to follow the tax refund procedures and will have to proceed under the Tucker Act. There is no choice or election on the taxpayer's part;

there is no confusion; and there is no need for intervention by this Court.

Any possible doubt on this score is erased by the fact that it is entirely within the province of the IRS to preclude a taxpayer from proceeding under the Tucker Act. This can be accomplished, as we have previously explained (*see supra* pp. 16-17), by the IRS's simply assessing the tax within the limitations period. The parade of administrative horribles envisioned in the Petition (Pet. at 26-27) is a parade that the IRS has complete power to bring to a halt. If the IRS operates as it should, another case like this one will never arise. There is thus no empirical support for the government's assertion (Pet. at 19) that the decision in this case "involves a matter of the highest recurring importance."

B. The Court of Appeals Applied Well-Settled Case Law in Holding That the Trial Court Properly Exercised Jurisdiction in This Case.

The government asserts (Pet. at 20-21) that the court of appeals adopted a "novel jurisdictional theory" in order to hold that the Tucker Act provides jurisdiction for New York Life's claim. The Federal Circuit did no such thing. To the contrary, the theory on which it relied dates back to the Court of Claims' 1954 decision in *Clapp v. United States*, 117 F. Supp. 576 (Ct. Cl.), *cert. denied*, 348 U.S. 834 (1954), and has been consistently applied since then. *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967); *South Puerto Rico Sugar Co. Trading v. United States*, 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965); *Pan Am. World Airways v. United States*, 122 F. Supp. 682 (Ct. Cl. 1954). Moreover, this theory has been specifically recognized and endorsed by this Court. *United States v. Testan*, 424 U.S. 392, 401-02 (1976).

The Tucker Act confers jurisdiction on the Court of Federal Claims if a claim is "founded upon any Act of

Congress." The line of cases beginning with *Clapp* recognizes that there are two classes of noncontractual money claims that fall within the Tucker Act.[15] One class involves cases in which money has not been paid to the government, but the claimant seeks money damages from the government. These cases must be brought pursuant to a particular authorizing provision of law in order to be founded upon "any Act of Congress." *Eastport*, 372 F.2d at 1007-08. A second class involves cases (like this one) in which " 'the Government has the citizen's money in its pocket,' " and the citizen seeks to recover the funds. *Id.* at 1008 (citation omitted). In these cases, it is sufficient that the money was improperly paid, exacted, or taken by the government under a " 'power supposedly conferred by statute.' " *Id.* (citing *Clapp v. United States*, 117 F. Supp. at 580). Thus, unlike the claimant in the class of cases involving money damages, a claimant in this second class of cases need not point to a particular statute authorizing recovery. As the court in *Clapp* explained:

> Our best estimate of the present law is that a claim to recover an illegal exaction made by officials of the Government, which exaction is based upon a *power supposedly conferring by statute*, is a claim "founded upon any Act of Congress."

Clapp, 117 F. Supp. at 580 (emphasis added).

This Court has distinguished claims for money damages, on the one hand, from claims for money "improperly exacted or retained," on the other, recognizing that claims for the return of money remitted to the government are

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[15] We have no quarrel with the government's statement (Pet. at 22) that Tucker Act jurisdiction also lies for claims against the United States arising out of express or implied contracts with the government. The issue in this case, however, is the scope of Tucker Act jurisdiction for noncontractual money claims. As we will now show, the government has not adequately described the two classes of noncontractual money claims that are cognizable under the Tucker Act.

different from claims for money damages where no such remittance has been made. Simply put, the first class requires a statute specifically mandating the award of money damages, whereas the second class does not. *See Testan*, 424 U.S. at 401-02 (citing *Eastport*, 372 F.2d at 1008, 1009). This Court stated more than 20 years ago that it would not "tamper with [the] established principles [set forth in *Eastport*]," *id.* at 400, and it has not done so. Review of the jurisdictional issue presented here thus is not warranted on the ground, advanced by the government, that the court below adopted a novel jurisdictional theory.

C. The Court of Appeals Correctly Held That the Instant Case Presents a Claim Under the Tucker Act.

1. The government notes (Pet. at 23-24) that Code section 7422(a) provides an "express statutory scheme" that governs recovery in tax cases. The government asserts that the references in Code section 7422(a) to "any tax" or "any sum" indicate that this provision was intended to provide the exclusive remedy in disputed tax cases. However, because New York Life's remittance constituted a "deposit" and not a "payment" of tax, the tax refund regime of Code section 7422(a) is not relevant to the disposition of this case. That section applies only where a taxpayer seeks a refund of an overpayment of tax, which has its source in a "payment" of tax. Irrelevant for the same reason are this Court's decisions in *Lewis v. Reynolds*, 284 U.S. 281, and *Flora v. United States*, 362 U.S. 145 (1960), upon which the government heavily relies (Pet. at 24). Those cases control where a taxpayer seeks the refund of an overpayment of tax. Again, that is not this case, since New York Life seeks only the return of its deposit.

The government's position could have the bizarre consequence of leaving New York Life without any remedy. The government recognizes (Pet. at 22) that if the IRS

concedes that a remittance is a deposit (*i.e.*, under an express or implied-in-fact contract theory), the taxpayer, pursuant to the Tucker Act, may bring an action in the Court of Federal Claims to recover the deposit. If, however, New York Life's remittance is properly characterized as a deposit, but the government were to prevail on the jurisdictional issue, New York Life would be precluded from recovering its deposit in a refund suit (since only tax overpayments can be recovered in such suits), and would also be unable to bring an action pursuant to the Tucker Act in the Court of Federal Claims.

2. There remains only the question whether New York Life's claim for the return of its deposit falls within the first or the second class of cases delineated in the *Clapp*, *Eastport*, and *Testan* decisions. As will be recalled, the first class of cases includes those where money has not been paid to the government, but where the claimant seeks money damages from the government. In order to bring a case of this sort, the claimant must point to a particular statute that allows the award of money damages. New York Life's claim does not fall within this first class of cases, both because New York Life made a remittance to the government and because there is no statute permitting the award of money damages in the circumstances of this case.

The second class of cases includes those where a remittance has been made, and the claimant seeks to recover the funds remitted to the government. As to this class of cases, *Clapp*, *Eastport*, and *Testan* teach that it is unnecessary to point to a particular statute that requires or permits money to be returned to the claimant; it is enough that the money was improperly paid, exacted, or retained by the government under a "power supposedly conferred by statute." *Clapp*, 117 F. Supp. at 580. New York Life's claim falls squarely within this second class of cases. As discussed above (*see supra* pp. 16-17), New York Life made a remittance of contested taxes, which the IRS failed to assess, but nevertheless retained under a power sup-

posedly conferred upon it by statute—in this instance, the provisions of the Internal Revenue Code, *e.g.*, Code section 7422(a). As a consequence of the IRS's failure to assess, however, the remittance constitutes a deposit, which, as we have shown, the IRS has no authority to retain under any power granted by the Code. Tucker Act jurisdiction thus attached to New York Life's claim and empowered the Court of Federal Claims to direct the IRS to return New York Life's deposit.

3. The government is in error in suggesting (Pet. at 25) that the court of appeals' reference to Code section 809 (Pet. App. at 21-22) means that the court resolved the merits of the underlying tax controversy. The 1984 taxes disputed in this case arose because the IRS applied Code section 809 in a way that reduced the amount of deductions claimed thereunder by New York Life. Contrary to the suggestion in the Petition, the court of appeals did not decide whether the IRS acted properly in reducing these deductions. Nor did the majority predicate Tucker Act jurisdiction on a finding or decision that the IRS's interpretation of Code section 809 was incorrect. To the contrary, Judge Friedman made it absolutely clear that the court was not reaching the merits of New York Life's claim under Code section 809, declaring (Pet. App. at 16a) that "the essence of a deposit is that the taxpayer is entitled to recover it without regard to the merits of the underlying tax claim." The reference in the majority's opinion to section 809 was merely a reference to the Code section that gave rise to the underlying tax controversy. In order to establish its authority to retain the remitted and disputed taxes, the IRS was required to assess the taxes in question. Because it failed to do so, the IRS retained, without legal authority, funds that belong to, and that must be returned to, New York Life.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH 1998

Supreme Court, U.S.
FILED
APR 7 1998
CLERK

(3)

No. 97-1229

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

NEW YORK LIFE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. a. The conflict among the circuits over the proper characterization of a tax remittance as a deposit or a payment is a pervasive one that requires resolution by the Court. In the Fifth and Federal Circuits, any remittance made by a taxpayer before the tax has been assessed—even a remittance expressly styled as a "payment" of tax—is considered to constitute a "deposit" rather than a "payment" of tax "as a matter of law" (Pet. App. 15a). See *Thomas* v. *Mercantile National Bank*, 204 F. 2d 943 (5th Cir. 1953); *Ford* v. *United States*, 618 F.2d 357 (5th Cir. 1980). These circuits refuse to give any consideration

to whether the facts and circumstances show that a "payment" rather than a "deposit" was in fact intended and in fact made by the taxpayer. By contrast, three other circuits have expressly rejected the conclusion of these courts that "there can be no payment of tax before the IRS makes a formal assessment of the * * * tax liability" (*Zeier* v. *United States*, 80 F.3d 1360, 1364 (9th Cir. 1996)). See *Moran* v. *United States*, 63 F.3d 663, 666 (7th Cir. 1995); *Ewing* v. *United States*, 914 F.2d 499, 503 (4th Cir. 1990), cert. denied, 500 U.S. 905 (1991). These courts have instead concluded that, in determining whether a "payment" or a "deposit" was made, courts are to look to the "facts and circumstances" surrounding the actual conduct of the parties. See, *e.g.*, *Ewing* v. *United States*, 914 F.2d at 503 (the facts and circumstances test "is the better reasoned [analysis] and represents the clear weight of authority"). Under the facts and circumstances test, the taxpayer in this case would plainly have been held to have made a "payment" rather than a "deposit." See Pet. 18.

Respondent is wrong in asserting that this direct and acknowledged conflict among the circuits can be resolved by looking solely to whether the "tax is contested" by the taxpayer at the time of the remittance (Br. in Opp. 11). In *Moran* v. *United States*, 63 F.3d at 669, the court specifically rejected the contention "that the decision to dispute a liability necessarily signifies an intent not to make a payment on that liability." The court noted in *Moran* that Section 7422(b) of the Internal Revenue Code provides that a refund suit may be brought "whether or not such tax * * * has been paid under protest" (26 U.S.C. 7422(b)). Whether a "protest" was made with

the remittance is therefore irrelevant in a tax controversy. 63 F.3d at 669. The court correctly concluded in *Moran* that neither the lack of valid assessment nor the taxpayers' "decision to dispute a liability" transforms a remittance designated as a "payment" into a "deposit." *Ibid.* In reaching that decision the Seventh Circuit specifically "disagree[d]" with the contrary rule adopted by the Federal Circuit in *Cohen* v. *United States*, 995 F.2d 205 (1993), on which the Federal Circuit relied in the present case (Pet. App. 13a ("Cohen controls this case.")).

Respondent is thus simply wrong in contending that, when "the tax is contested, the courts * * * uniformly treat the remittance as a deposit in the absence of assessment" (Br. in Opp. 11). To the contrary, the courts of appeals have forthrightly acknowledged that they are in conflict on this issue and that no fewer than "three approaches" have been applied in distinguishing between "payments" and "deposits" (*Fortugno* v. *Commissioner*, 353 F.2d 429 (3d Cir. 1965), cert. dismissed, 385 U.S. 954 (1966)). As the Seventh Circuit emphasized in *Moran*, during the fifty years that have passed since the Court's decision in *Rosenman* v. *United States*, 323 U.S. 658 (1945), "[l]ower courts have * * * debated what rule *Rosenman* established or implied." 63 F.3d at 667. "The circuit courts have divided in their application of *Rosenman*" and have adopted disparate tests that lead to disparate results. *Ewing* v. *United States*, 914 F.2d at 503. Resolution of this longstanding conflict among the courts of appeals is needed to ensure consistent treatment of taxpayers and to avoid wasteful and recurring litigation.

b. Respondent is incorrect in asserting that this "controversy exists only because the IRS made a simple mistake—it failed to assess a disputed tax within the statute of limitations on assessment" (Br. in Opp. 19). As we explain in the petition (Pet. 17), the obligation to pay a tax exists without regard to whether an "assessment" of the tax has been made. See 26 U.S.C. 6151(a) ("when a return of tax is required * * * , the person required to make such a return shall, *without assessment* or notice and demand from the Secretary, pay such tax") (emphasis added)). An assessment is "more or less a bookkeeping procedure that permits the government to bring its administrative apparatus to bear in collecting a tax * * * but it is neither the beginning nor the end of tax liability." *Moran* v. *United States*, 63 F.3d at 666. When, as in the present case, the government has already collected the $31 million in disputed tax and interest, there is no need for any further collection action to be taken and therefore no need for any assessment to be made. See *ibid.* The courts below erred in attaching any importance—much more in attaching a *dispositive* importance—to the absence of an assessment for a tax that has already been paid.

Moreover, under the Internal Revenue Code, there is no such thing as a tax "deposit." The IRS has adopted a Revenue Procedure that establishes specific terms under which the agency will treat remittances from taxpayers as a "deposit." Rev. Proc. 84-58, 1984-2 C.B. 501. Unless that Procedure is followed, any remittance made to the IRS in connection with a proposed deficiency is deemed a "payment" of tax. *Ibid.* In this case, respondent specified in its transmittal letter that it desired its

remittance to be treated as a "payment"—and not as a "deposit"—under the Revenue Procedure (Pet. App. 28a-29a). As the petition explains at length (Pet. 10-19), in holding that this express "payment" of tax should instead be treated as a "deposit," the decision in this case misinterprets the decision of this Court in *Rosenman* v. *United States*, *supra*, and conflicts directly with the decisions of several other circuits.

2. For the further reasons detailed in the petition (Pet. 19-27), the court of appeals erred in concluding that the Tucker Act provides jurisdiction over this case. Respondent offers no genuine explanation for the court's extraordinary expansion of the jurisdiction provided by that statute. Instead, respondent protests that it would have had no remedy if the court had not assumed jurisdiction in this case (Pet. 23-24). But the remedy that Congress has long provided to persons such as respondent—who pay a tax and thereafter desire to obtain their money back—is available to respondent. That remedy is the suit permitted by 26 U.S.C. 7422. That statute permits a taxpayer suit to recover "any * * * tax alleged to have been erroneously or illegally assessed or collected" or "any sum alleged to have been excessive or in any manner wrongfully collected" (26 U.S.C. 7422(a)). Congress provided jurisdiction for this statutory suit for recovering such a "tax" or "sum" under the express provisions of 28 U.S.C. 1346(a) and *not* under the Tucker Act. See Pet. 19-26. Indeed, respondent has already taken the initial step required for pursuing such an action—by filing a timely refund claim—and remains free to pursue that remedy. See Pet. 6 n.5.

The Tucker Act does not provide taxpayers with yet another avenue for obtaining relief from a tax

obligation that they contend is erroneous. That, however, is precisely the conclusion that the court below adopted—a conclusion that wholly bypasses the detailed rules that Congress provided for the recovery of a "tax" or "sum" "in any manner wrongfully collected" under the internal revenue laws (28 U.S.C. 1346(a)(1)). Under the detailed rules that Congess provided for such suits, respondent was not entitled to recover the "tax" or "sum" that it tendered in this case because that amount did not exceed what was owed at the time that the payment was made. See *Lewis* v. *Reynolds*, 284 U.S. 281, 283 (1932); Pet. 12, 24. Because Congress has provided "in great detail the protections and remedies applicable to such action," the court of appeals erred by resorting to alternative non-statutory theories of relief under the Tucker Act. See *United States* v. *Fausto*, 484 U.S. 439, 443 (1988).*

The non-statutory remedy erected by the court of appeals in this case sews broad confusion for the most routine aspects of tax administration. Neither taxpayers nor the United States can now know with certainty where and how tax controversies will be determined.

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* In its response to the petition, respondent does not even address this Court's decision in the *Fausto* case.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

APRIL 1998